



Science and Religion in Liberal Democracy

Legitimacy Challenges

Jønch-Clausen, Karin

Publication date:
2015

Document version
Early version, also known as pre-print

Document license:
[CC BY-NC-ND](#)

Citation for published version (APA):
Jønch-Clausen, K. (2015). *Science and Religion in Liberal Democracy: Legitimacy Challenges*. Det Humanistiske Fakultet, Københavns Universitet.



PhD thesis

Karin Jønch-Clausen

Science and Religion in Liberal Democracy: Legitimacy Challenges

Academic advisor: Klemens Kappel

Submitted: 11/05/15

Science and Religion in Liberal Democracy: Legitimacy Challenges

PhD thesis

By Karin Jønch-Clausen

Department of Media, Cognition, and Communication. Philosophy Section.

Academic advisor: Klemens Kappel

Co-advisor: Sune lægaard

Submitted: 11 May 2015

Word count: 46,304

Table of Contents

Acknowledgements	4
Introduction	6
Article overview	30
Article 1: Sincerity in the wide view of public reason: persistent obstacles.....	33
Article 2: Scientific Facts and Methods in Public Reason.....	60
Article 3: Factual claims in religious exemption cases: limiting the “hands-off religion” approach.....	83
Article 4: Social Epistemic Liberalism and the Problem of Deep Epistemic Disagreement.....	108
Bibliography	132
English Summary	137
Dansk Resumé	138

Acknowledgements

First, and foremost, I want to thank my supervisor, Klemens Kappel, from whom I have learned a great deal in the last few years. Klemens has taught me a lot about writing academic articles. I have been very grateful for Klemens' sharp commentary and many insightful discussions. Klemens has an enthusiasm for the research which is very catching; our many discussions were therefore not only very helpful, but also a great time and very motivating. Beyond excellent dissertation supervision, Klemens provided very constructive feedback and support when I was teaching as well as valuable feedback on paper presentation. I was very fortunate to also have a co-advisor, Sune Lægaard. Sune has provided valuable commentary and criticism on the articles as well as very useful advice for structure and organization. I have had extraordinary supervision on the dissertation, for which I am extremely grateful.

I had the honor of a research stay at Northwestern University's vibrant philosophy department which allowed me to attend several exciting workshops and seminars in both political philosophy and social epistemology. I want to thank Sandy Goldberg for this unique opportunity. I also want to thank Cristina Lafont for letting me attend her thought-provoking and lively seminar: "The Future of Democracy".

I also had the great opportunity of a visiting-scholar stay at the University of Wisconsin Law School. In particular, I want to thank the Institute for Legal Studies director, Sumudu Attapatu, for her warm hospitality and Alta Charo for some lively and stimulating discussions on issues related to my paper on religious exemptions.

My colleagues at Copenhagen University are the best. I came to miss them much when I uprooted and left for the States. For suggestions and support for my dissertation I want to thank in particular: Martin Marchman-Andersen, Morten Ebbe Juul Nielsen, Andreas Christiansen, Julie Zahle, Nana Kongsholm and Stine Djørup.

I want to thank Elizabeth Anderson for her helpful criticism as commentator on my paper on science in public reason at NNPE's (Nordic Network on Political Ethics)

conference and PhD- course in normative political philosophy/theory and José Luis Marti for his valuable input as commentator on this paper at EPISTO kick- off conference, ARENA centre for European studies, University of Oslo, Norway.

Finally, I want to thank my always supportive and engaged parents. My sister, Heidi, has provided some good pep talk and shared experiences from her dissertation writing years. When the deadline for the dissertation was approaching my mother and my parents-in-law, Jack and Kathy Horton, did an incredible amount of babysitting. I am much in debt to them for all the help they provided with the kids. Although he has sworn that he would throw himself off a balcony if he ever heard dissertation terms such as ‘reasonableness’ again (a sentiment that I was at times somewhat sympathetic to) my husband Ryan has been a great support throughout my writing process. Even when work and family life was at its busiest, Ryan made my dissertation a big priority. Finally, I want to thank my kids Emilia and Lewis. While it may be dishonest to thank them for helping me get the dissertation done in any way, I do want to thank them for helping make the dissertation writing years some very happy years.

Introduction

What role should religious and scientific reasons play in the making and justification of a democracy's basic laws, policies and institutions? Should public officials refrain from grounding basic laws and policies in religious reasons and make sure that laws always accord with, and are informed by, established scientific facts and methods? Or does such exclusion of religious reasons and privileging of scientific reasoning generate unacceptable legitimacy problems: if the public subject to the laws in question subscribe to religious views that they find pivotal to political decision-making or if they subscribe to reasons at odds with established science, would it be undemocratic to exclude such reasons from political justification? If we want to say that political equality is inherent to any desirable conception of democracy, is it contrary to our commitment to political equality to exclude certain epistemologies and types of belief from forming and justifying basic laws? In the dissertation, I will discuss these kinds of questions as they arise within the framework of Rawlsian public reason.

If we look at real-life politics in a country like the United States, it is obvious that the question concerning religious reasons in the public sphere is pertinent. The Supreme Court has in recent decisions carved out a larger role for religion in the public sphere. In a 2014 landmark case, *Town of Greece v. Galloway*, the Court upheld the right of a New York town board to start its public sessions with sectarian (Christian) prayer¹. As the constitutionality same-sex marriage bans is being tested in the Supreme Court, 2016 presidential candidates are urging Christians to pray for a negative outcome². At the same time, a recent Pew research survey has shown that nearly three quarters of Americans feel that religion's influence on public life is waning, many of whom find

¹<http://www.nytimes.com/2014/05/06/opinion/a-defeat-for-religious-neutrality.html>

² <http://www.theguardian.com/us-news/2015/apr/26/cruz-paul-same-sex-gay-marriage-abortion-iowa-faith>

this to be a bad thing. 41% of Americans say that they think there has been too little faith and prayer from political leaders.³

Still the general norm that public officials should refrain from justifying laws and policies with the use of sectarian religious argument is widely accepted and usually public officials (legislators, judges, justices etc.) will indeed refrain from drawing (directly) on religious arguments when deliberating on contentious issues like abortion and same-sex marriage. This general public reason norm is particularly stringent in the courts. Religious arguments will not make their way to the oral argument on the constitutionality of same-sex marriage bans in the Supreme Court. But legislators also by and large abide by this norm.

Meanwhile, no one questions the fact that religion *is* decisive in the politics on social issues like abortion and same-sex marriage. Abortion proponents have recently accused legislators of furthering a religious agenda on abortion policies with the use of insincere secular arguments pertaining to the health and safety of women.⁴ It is clear that many legislators who have been fighting to uphold their state's same-sex marriage bans are religiously motivated.⁵ Some will find this troublesome, others not. We disagree deeply about where to draw the boundary of separation between religion and politics. Draw the boundary too narrowly and you will have reasonable concerns about the curtailment of free exercise and a reasonable concern that there is something undemocratic about suppressing citizens' deeply held commitments in the deliberation and justification of our common laws. Draw the boundary too broadly and you will have reasonable concerns about the curtailment of free exercise of citizens who subscribe to different religions and religious imposition on those who are not religious.

³ <http://www.pewforum.org/2014/09/22/public-sees-religions-influence-waning-2>

⁴ I am referring here to the Targeted Regulation on Abortion Providers (TRAP) laws requiring reproductive health clinics to have admitting privileges at a nearby hospital and/or requiring them to pass surgical clinic standards. I will discuss these laws in the dissertation's first article, in which we discuss the use of insincere reasoning in political deliberation

⁵ Even at the level of the Supreme Court, you will sometimes hear suspicion that religious motivation plays a part. The question sometimes arises on whether a predominantly Catholic Court may have been influenced by their religious views in their recent decisions which have been marked by an expansive interpretation of the free exercise clause.

So where do we draw the line for the acceptable use of religious reasons in politics? Do we insist on secular arguments and accept that religion is lurking just underneath the surface? Or does the obligation to provide secular arguments only make sense if we insist on more separation, if we insist on legislators providing secular arguments that can stand on their own merits, without the backing of religious views? Does the latter stronger version of the norm provide any guidance as to what to do under non-ideal conditions of widespread noncompliance? Does it require super human cognitive capacities?

What about the ideal that political deliberation and justifications should be informed by and accord with established science? These days this ideal has almost an almost partisan tone in American politics. We hear about “GOP’s war on science” and we hear prominent republican figures deny that that GOP is engaged in any kind of war on science.⁶ Climate change is of course one of the first issues that comes to mind when the topic of science in politics comes up. On the climate change issue, the idea that law and policy-making should accord with the best available science does indeed meet resistance. It may be more precise to say that it is the idea that climate politics should be informed by the current broad intra-scientific consensus that meets resistance, since the politicians who deny anthropogenic climate change tend to do so with the use of scientific evidence. Is there a case to be made that politicians who reject the scientific consensus on climate change, when engaged in making or rejecting laws and policies, are violating norms of good democratic citizenship? Is there a democratic ideal that says that laws and policies should accord with and be informed by established science?

If we could clean up the messy world of real life politics, what would proper place for religious and scientific reasoning in political deliberation and justification? What would an account of legitimacy worked out under more favorable conditions require? This is the kind of question that is raised in Rawls’s theory on public reason. Rawls’s public reason account has been and is still a major influence on discussions on legitimacy in political philosophy. We find in Rawls’s account both the ideal that religious reasons

⁶ <http://www.politico.com/magazine/story/2015/01/no-the-gop-is-not-at-war-with-science-114195.html#.VUU00fIViko>

should be restricted and the ideal that scientific reasoning should be privileged in the deliberation on basic laws and policies in a liberal democracy.

In the following, I will give a brief account of the role of religious reasons in Rawls's public reason account. In so doing, I will outline some of the basic building blocks of the account (1) and I will introduce the dissertation's first article on public reason's sincerity principle. In section (2), I introduce the question of science's role in public reason and I show how the rationale for restricting the role of religious reasons in public reason is related to the rationale for privileging scientific reasoning. I then introduce the dissertation's second article which concerns the role of scientific methods and conclusions in Rawls's public reason account. In section (3), I move on to discuss the role of religious and scientific reasons in religious exemption cases. I provide a few comments on the questions concerning whether religious exemptions may be publicly justified in Rawlsian public reason and I discuss the role public reason plays when adjudicating religious exemption claims. The dissertation's third article, which concerns the adjudication of factual claims in exemption cases, will then be introduced. In section (4), I discuss Robert Talisse's recently proposed epistemic justification of liberal democracy. Talisse's justificatory approach purportedly avoids excluding citizens' comprehensive views in justification while still accommodating what Rawls calls 'the fact of reasonable pluralism': the fact that a free society will comprise a plurality of sometimes conflicting reasonable comprehensive worldviews. I will introduce the dissertation's final article, in which we show why this epistemic justification of liberal democracy fails as a public justification. Finally, I will in section (5) make some remarks on my strategy of inquiry.

1. Religious reasons in Rawls's account on public reason

The general public reason idea is that (coercive) political power must be supported by reasons that are endorsed or endorsable by the citizens subject to it.⁷ Public reason is

⁷ Public reason is a public justification sub-species. Public justification is the more broad idea that in a democratic society (coercive) political power must be publicly justified or publicly justifiable to the citizens subject to it. Public justification need not be deliberative; however, for Rawls deliberation is constitutive of justification. For a critical discussion of this aspect of Rawlsian public reason see (Gaus and Vallier 2009)

commonly understood as “part of the idea of democracy itself” (Rawls 1997) and part of an ideal of democratic citizenship. A widely held view is that a liberal democratic ideal of citizenship includes a recognition of *respect for persons* as politically equal and self-directing moral agents (Macedo 1990:249, Audi 1993:771, Waldron 1993:36-37) or as ends rather than means (Larmore 1996:137) Respect for fellow citizens thus understood requires that that coercive power to which they are subject will be justifiable to these citizens with reasons that they could reasonably endorse. Providing public reasons is a way of showing respect for fellow citizens as free and equal or as ends rather than means.

The very rough formulation of public reason that I have just provided is of course ambiguous. Particular conceptions of public reason provide different answers to questions such as: Which political power? Supported by reasons in which way? What citizens have the obligation: public officials? Ordinary citizens? At what level of idealization? I will sketch out Rawls’s answer to these questions shortly (in 1.2).

Since public reasons are the kind of reasons that can be justified to *all* reasonable citizens and since religious reasons in religiously pluralistic societies are bound to be divisive, a particular interest has been taken in this special class of reasons. Indeed religious reasons have become for many the paradigm case of non-public reason. Rawls was one of the 20th century most influential public reason theorists. Rawls first articulation of the ideal of public reason, in which he introduced restraints on religious reasons in certain political activities, sparked a storm of criticism about the constraints and burdens placed on religious citizens in the public sphere (Greenawalt 1995, Wolterstorff 1997, Eberle 2002, Stout 2004, Weithman 2002) The criticism and debate was at times marked by misunderstandings between theorists (often about the boundaries of the public sphere in which public reason norms are to apply as well as the questions concerning whether and when the norm applies to ordinary citizens). It was, nonetheless, in many respects a very constructive debate. It prompted Rawls to clarify and revise his account (Rawls 1997) and it spurred a number of revisionist proposals; proposals that would bring to light new and important questions about religion in public reason and religion in politics more generally. Very roughly, one could say that these

proposals fall on a scale between the those who believe that religious reasons have *no room* in political justification (Macedo 2000, Audi 1997,2000) and those who believe that there should be no constraints *at all* on the use religious reasons in the public sphere (Wolterstorff 1997). Using this admittedly over-simplified way at looking at the debate, one may say that the most popular proposals delineating the role of religion in public reason fall somewhere in the middle of this scale: they neither include nor exclude religious reasons entirely from political deliberation, but rather set a range of restrictions for their use. Rawls latter public reason proposal, ‘the wide view of public reason’, is of this kind.

1.1 From reasonable pluralism to public reason

In the following, I will provide a rough sketch of some of political liberalism’s basic theoretical ideas and principles central to Rawls’s public reason account. Rawls famously argued that that the idea of public reason emerges as a response to the problem of legitimacy under conditions of *reasonable pluralism* in free societies. Rawls held that a free society would inevitably comprise a plurality of reasonable, yet sometimes conflicting moral, religious and philosophical worldviews. According to Rawls, reasonable pluralism poses a challenge to a commitment that we should have to justify coercive power to its subjects. One of the main ideas on which political liberalism is founded is the idea that political power is the power of the free and equal citizens that constitute a constitutional democracy. But how does a deeply pluralistic citizenry legitimately exercise this power over one another?

Rawls believed that such power must be exercised in accordance with a *criterion of reciprocity*: we must “sincerely believe that the reasons we offer for our political action may reasonably be accepted by other citizens as a justification for those actions” (Rawls 2005:50). The criterion of reciprocity expresses the relationship between citizens in a well-ordered constitutional democracy (Rawls 2005:17) and it is embodied in Rawls’s famous *liberal principle of legitimacy* which says that “Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse

in light of principles and ideals acceptable to their common human reason” (Rawls 2005: 137).

In light of his commitment to reciprocity and liberal legitimacy, Rawls held that in a free society marked by reasonable pluralism, no one comprehensive worldview should serve as the public justification of the polity’s basic institutions and political principles. Justification should be *freestanding* in the sense of avoiding the presupposition of any one comprehensive worldview (Rawls 2005:10). Only by committing ourselves to freestanding justification of our basic political principles can we avoid illegitimate coercion of reasonable citizens subscribing to reasonable worldviews. In accordance with these commitments, Rawls argues that citizens who live under liberal democracy’s circumstance of reasonable pluralism have a *duty of civility* to be able justify their decisions on fundamental political matters with the use of reasons that other reasonable citizens can be reasonably expected to endorse.

1.2 Public reason’s content, structure and scope

What kind of reasons can other reasonable citizens reasonably be expected to endorse? What is the content of public reason? In order to derive reasons that reasonable citizens can be expected to endorse, we start with certain fundamental ideas implicit in the public culture of a constitutional democracy “in the hope of developing from them a political conception [of justice] that can gain free and reasoned agreement in judgment.” (Rawls 2005: 101) These political conceptions will be freestanding, they will be supported but yet not presuppose citizens’ diverse reasonable comprehensive doctrines.

Any reasonable political conception of justice will include “first, a list of certain basic rights, liberties, and opportunities [...] Second, an assignment of special priority to those rights, liberties, and opportunities, especially with respect to the claims of the general good and perfectionist values; and third, measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms.”(Rawls 1997: 774) These ideas, which are drawn from the public culture of a constitutional democracy, are fixed points or cornerstones in any reasonable political conception. The idea of public reason is

worked out for a well-ordered society (Rawls 1997:765). A well-ordered society is a society that is characterized by such reasonable political conception of justice: in a well-ordered society citizens endorse reasonable comprehensive worldviews that support reasonable political conceptions of justice. These reasonable political conceptions of justice in turn support society's basic structure.” (Rawls 1997: 807).

Reasonable citizens will endorse one in a family of reasonable political conceptions of justice, all of which will encompass the abovementioned cornerstones. The political values harbored in these political conceptions will be supported by their reasonable comprehensive worldviews. Reasonable citizens will thus, through their own unique paths, endorse political conceptions that are shared by other reasonable citizens (although not all reasonable citizens share the very same conception): this is the idea of the *overlapping consensus*. Citizens will appeal to these shared values when engaged in political activity that requires the use of public reason.

Due to the appeal to shared reasons and the overlapping consensus, Rawls’s public reason account is sometimes referred to as a *consensus-based account*. An alternative account of public reason (or public justification) that has gained traction in recent years is the *convergence-based account*. Convergence-based accounts demand only consensus on outcome and not consensus on justificatory reasons. The general convergence idea is very simple, at least in the criminally simplified two-person scenario: Say Carlos and Amy are the only two members of a given constituency. Carlos and Amy are both enthusiastic supporters of law *L*. Carlos supports *L* for reason *r* and Amy supports *L* for reason *z*. While Carlos and Amy do not share each other’s reasons and maybe disagree with each other’s reasons, Carlos sees that *z* is a good reason for Amy and Amy sees that *r* is a good reason for Carlos. Everything is great. No problematic imposition seems to be involved. Carlos is not imposing his reason on Amy vice versa. Both agree that the coercive law is warranted. Current prominent proponents of the convergence view such as Gerald Gaus and Kevin Vallier work with a convergence idea of public justification that differs in several other respects from the Rawlsian account. For limitation purposes, I do not examine these very interesting contributions in my articles.

The domain in which public reason applies is limited in several ways. Public reason applies only to constitutional essentials and matters of basic justice. Constitutional essentials cover questions pertaining to fundamental rights and liberties as well as the basic structure of the political process. Matters of basic justice cover questions of basic economic and social justice (Rawls 1997:767). Rawls remains openly agnostic about whether the public reason ideal should apply beyond this boundary⁸ and some critics have argued that the boundary should be abolished (Quong 2011: 273–289)⁹ or that the distinction between constitutional essentials and ordinary legislation is impossible to maintain, since almost any piece of ordinary legislation could have some bearing on constitutional essentials (Habermas 2008:123 fn.18; Greenawalt 1995: 1306-1308).

The main site of public reason is the public political forum which can be divided into three parts: (1) the discourse of judges, (2) the discourse of government officials, and (3) the discourse of candidates for public office and their campaign managers (Rawls 1997:767). Public reason applies much less stringently to ordinary citizens. Ordinary citizens “fulfill their duty of civility and support the idea of public reason by doing what they can to hold government officials to it.” (Rawls 1997:769) Citizens in supporting the idea of public reason will “repudiate government officials and candidates for public office who violate public reason.” (Rawls 1997:769) In so doing, citizens ensure that public officials, dependent on their constituents, will abide by their duty of civility. However, ordinary citizens are also sometimes themselves under an obligation to apply public reason to law or policy questions. When voting on political fundamentals “citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact.” (Rawls 1997:769)

At least in his early articulation, Rawls also wanted to include citizens’ *discourse* (public political debate) on fundamental political matters. However, as Paul Weithman

⁸ “...my aim is to consider first the strongest case where the political questions concern the most fundamental matters. If we should not honor the limits of public reason here, it would seem we would not need honor them anywhere. Should they hold here, we can then proceed to other cases.” (Rawls 2005:215)

⁹ Quong believes that public reason should apply to all exercises of political power (Quong 2011: 273-287)

has pointed out (Weithman 2002: 182-184) mention of ordinary citizens' discourse or discussion on fundamental questions is almost absent in the revised version of the public reason account and it is importantly left out in Rawls's delineation of the main site of public reason: the public political forum. In my articles, I set aside the very interesting and important discussion concerning the extent to which public reason applies to ordinary citizens' political activity and I focus on public officials. I do so partly because this focus makes the philosophical discussions more relevant to real-life politics in which public reason norms are at play. Furthermore, it allows me to focus on the less controversial aspect of public reason and discuss problems that arise here.

1.3 The principle of restraint in Rawls's wide view of public reason

Religious reasons are drawn from comprehensive doctrines and therefore cannot form the basis of a justification that all reasonable citizens are expected to share. These reasons are therefore out of the bounds of public reason and citizens must practice restraint and avoid employing these reasons as justificatory when fundamental political questions are at stake. Critics have objected on this ground that Rawls's public reason account is problematically *exclusionary*: by declaring religious reasons out of bounds, public reason excludes religious citizens from acting from their fundamental commitments in public life.; as Nicholas Wolterstorff has put it in a much quoted passage "It belongs to the *religious convictions* of a good many religious people in our society that *they ought to base* their decisions concerning fundamental issues of justice *on their religious convictions*" (Wolterstorff 1997:105). According to critics, public reason's constraint on the use of religious reasons amounts to an objectionable inequity in the public reason account (Greenawalt 1995:120) that undermines the value of religious liberty (Wolterstorff 1997:105) Furthermore, the principle of restraint is argued to violate the integrity of the religious believer by requiring that the believer sets aside religiously based moral convictions that may constitute an essential part of the believer's self (Perry 1988: 181-82) and convictions that the believer may find pivotal to the fundamental questions at stake. The further argument is often made that the principle of restraint is not only 'positively objectionable' (Greenawalt 1987:155), it is indeed also a principle that is impossible to abide by. Religious commitments are part of

the religious reasoner's programming and it is not cognitively possible for the religious reasoner to just reprogram and set aside these religious convictions when deliberating on a certain category of political questions (Greenawalt 1987:155, Wolterstorff 1997: 89).

Rawls's revised public reason 'the wide view of public reason' was in great part an attempt to meet some of this criticism concerning the exclusionary nature of public reason and make the account more inclusive to the religious reasoner. In Rawls's revised account of public reason, "The Idea of Public Reason Revisited", he added a *proviso* to the public reason obligation which says that we may "introduce into political discussion at any time our comprehensive doctrine, religious or non-religious, provided that in due course, we give properly public reasons to support the policies and principles our comprehensive doctrine is said to support" (Rawls 1997: 776).

In light of this proviso, how are we now to understand the public reason obligation from the perspective of the religious citizens or official? In the following, I will take the perspective of the religious public official and spell out the public reason obligation as expressed in the wide view of public reason.

Since a secular reason must be forthcoming, the public official should not support or advocate policies for which she believes that there is only a religious rationale and not a sufficient secular rationale. What kind of rationale must be offered in due course (i.e. what is a sufficient, secular¹⁰ rationale)? For Rawls, secular means that the rationale is not in any necessary way dependent on religious evidence (Rawls 1997:780 fn.).

Plausible means that the public reasoner must *sincerely* believe that the reason is good and that the reason is sufficient to justify the political institution/law/policy in question. Sufficient in turn means that the reason is a properly shared reason and that it can stand on its own merits. In the dissertation's first article, we get further into the question of what constitutes a "sufficient" rationale. When is "in due course"? As we write in the dissertation first article, We would agree with Cristina Lafont assessment of "due

¹⁰ Rawls stresses that public reasons and secular reasons are not the same. Secular reasons that presuppose controversial moral and philosophical doctrines are also out of the bounds of public reason.

course” when she writes that although much suggests that proper public reasons should be offered sooner, “the latest possible time would be when the legislative decisions are made” (Lafont 2007: 240). The next question is how one would know that a sufficient public reason is forthcoming? It seems that the public official, to fulfill the public reason obligation, must be aware of the existence of a sufficient public reason that could justify her political action. However, if that is the case, then why not offer this public reason to start with? (Gaus 2003:200). The more inclusive principle of restraint that is articulated in the wide view of public reason thus harbors some significant ambiguities.

In the dissertation’s first article, ‘Sincerity in public reason: Persistent obstacles’, we (article is co-authored by Klemens Kappel) will get further into some of these ambiguities. I have mentioned that public reasons must be sincere, but Rawls himself did not articulate the more precise content of public reason’s sincerity requirement. In the first article, we show why a sincerity principle is vital to Rawls’s public reason account. Following Micah Schwartzman, we illustrate how insincere political deliberation may result in lack of due respect, distortion and side-tracking of important policy issues, irrational outcomes and polarization. We further show that Schwartzman’s recent articulation of a sincerity principle for ‘the wide view of public reason’ is unable to successfully address the problems associated with insincere political deliberation. A weak interpretation of Schwartzman’s sincerity principle simply replicates the problems associated with insincere political deliberation and a stronger interpretation exceeds the capacities of normally functioning epistemic agents.

2. Science in public reason

So far I have been discussing the idea that religious reasons should be constrained in public reason, I turn now to a different idea: the idea that science should be privileged in public reason. One reason for examining these ideas jointly is that the idea that science should be privileged in public reason is intimately related to the idea that religion should be excluded: some of the reasons that can be used to justify the privileged role of science can also be used to justify religion’s restricted role. It has been argued that scientific reasons should be privileged in political deliberation and/or public justification because they are publicly accessible, shareable (Rawls 2005) and self-

critical (Douglas 2015). In turn, religious reasons have been excluded because they are deemed publicly *inaccessible*, sectarian (Rawls 2005) and authoritarian or dogmatic (Rorty 1994). However, some of these assumptions about scientific and religious¹¹ reasons are difficult to maintain under closer scrutiny. Science is often inaccessible in the sense of being complex and hard for the layperson to assess. Much of science is in some sense controversial within and outside of scientific communities and scientific findings may be the result of systemic bias or unwarranted orthodoxy. The assumptions about religion can also be questioned. Religious citizens can be perfectly willing to see their views as fallible and open to revision. They may appeal to readily available evidence such as scripture when supporting their religious views on such issues as same-sex marriage and abortion and they may believe that belief in the existence of God can be rationally demonstrated (Vallier 2011:376).

Another reason for focusing on religious and scientific reasons is that it allows me to explore a part of Rawls's theory that is underdeveloped. The focus of Rawls's public reason account is on moral commitments. Very little attention is dedicated to the disagreements that arise from different factual or metaphysical commitments that pertain to what the world is. Obviously religious worldviews feature both kinds of commitments.¹² Disagreements that concern what the world is will often be deep and persistent. Not only will we disagree about facts, we are bound to disagree about the epistemic principles that we use to arrive at and support our facts. Michael Lynch (Lynch 2010) uses the example of evolution vs. creationism to illustrate this point. The disagreement about evolution does not merely concern facts, it concerns the epistemic methods we use to arrive at our facts and evaluate them: Is scripture, for example, appropriate evidence? When we disagree about basic epistemic methods and principles,

¹¹ For an interesting discussions on the questionable assumptions about religious reasons' non-public nature see (Eberle 2000: chapter 8)

¹² In the dissertation's first article, we discuss the abortion case. The disagreement that makes the abortion controversy persistent is not primarily a disagreement about value, it is a disagreement about what the fetus is. If you live in a world in which fetuses are ensouled, for example, then this factual or metaphysical belief about the world will be crucial in the ordering of abstract values such 'autonomy' and 'respect for life'. For a great discussion of this point see Gerald Gaus 'Is public reason a normalization project: deep diversity and the open society (forthcoming), available at: <http://www.gaus.biz/PublicReasonNormalization.pdf>

e.g. which authorities and methods of inquiry one should trust and how to best gather and evaluate evidence pertinent to a given policy-question, disagreements about facts become almost impossible to settle, because there is no common reference point or framework from which to settle them. (Lynch 2010, Kappel 2012) Is there a basis of shared facts and epistemic principles from which public reason should proceed? (Kappel et.al 2014) Rawls hardly addresses the question of whether an idea of epistemic reasonableness can be defended within his public reason framework.

In the dissertation's second article, we address some of the abovementioned issues and questions. The second article examines a science stricture that Rawls sets for public reason. Rawls held that public reasons must accord with methods and conclusions of science that are 'widely accepted' or 'non-controversial'¹³. In the article, we examine this stricture in order to find the most plausible interpretation of the stricture and from there explore the question of how such a stricture may be justified within Rawls's theoretical framework. We argue that the most plausible interpretation of 'non-controversial' or 'widely accepted' science is science that is subject to a broad consensus in intra-scientific communities as well as in the general public. We explore several possible justifications that could be available to Rawls for holding that public reason should accord with non-controversial science thus understood. Among possible justification routes, we examine and reject the idea that non-controversial science is uniquely public in being accessible and non-sectarian. We further question the possible move of tying a scientific standard stricture to notions of reasonableness as applied to persons or to disagreements (i.e. holding that reasonable person's reason in accordance with non-controversial science or that non-controversial science is beyond reasonable disagreement). We argue that such move would be at odds with Rawls's moral understanding of the idea of reasonableness. Attempts to add the scientific standard requirement to this moral idea of reasonableness comes out as ad hoc, without sufficient theoretical support.

¹³ "[...]in making these justifications, we are to appeal only to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial" (Rawls 2005:224)

3. Scientific and religious reasons in religious exemption cases

In my third paper, I examine the role of scientific and religious reasons in a recent Supreme Court case: *Hobby Lobby v. Burwell*. In *Hobby Lobby v. Burwell* two ‘closely held’¹⁴ corporations were granted an exemption from Affordable Care Act’s contraceptive mandate. The plaintiffs in the case believed that four contraceptives included in the mandate worked as abortifacients and that including such contraceptives in their insurance plan for their employees would violate their deeply held religious belief that destroying a fertilized embryo is a grave sin to which they could not be complicit. The owners of the corporations therefore filed an exemption claim in order to be able to exclude these contraceptives from their employees’ insurance coverage. The plaintiffs ultimately won the case in the Supreme Court. However, following the ruling much commentary focused on the purported faulty science that backed the plaintiffs’ claims about the workings of the contraceptives in question. Taking its starting point in *Hobby Lobby*, the dissertation’s third paper examines the role of factually erroneous claims in religious exemption cases and whether and when such factually erroneous claims can be exempted from challenge in the courts. Before I introduce this article, I would like to make a few remarks about religious exemptions and public reason.

I cannot in my dissertation get into the huge literature that concerns the basis for religious exemptions and the question of whether religion is special for the purpose of accommodation. Without getting too deep into this literature, I do want to briefly address the (for my dissertation) important question: How does a religious exemption regime square with Rawlsian public reason? In particular: Can religious exemption regimes be publicly justified in accordance with Rawlsian public reason? And do religious exemption regimes problematically introduce religious reasons into the public sphere? Getting into depth with these questions would require a full paper. Here I merely want to make a few comments.

¹⁴ The Court did not define ‘closely corporation’ and the definition thus became a point of contention after the ruling. The Internal Revenue Service defines a closely held corporation as being more than 50 percent owned by five or fewer individuals in the last half of a tax year, and not a personal service corporation. <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5>.

Can a religious exemption be publicly justified according to Rawlsian public reason? An immediate obstacle pops up when it comes to providing a Rawlsian public justification of religious exemptions: the singling out or privileging of religion. If a justification relies on treating religion as a special good, it would not be a freestanding justification.¹⁵ Such a justification would seem to rely on the assumption that certain conceptions of the good are more valuable than others. One question that must be asked when relating exemption regimes to public reason is thus if it would be possible for the political liberal to provide a justification for religious exemptions that would avoid this sort of assumption.

I want to point to one interesting answer to this kind of question that pertains to the exclusion objections to public reason that I have been discussing. It can be argued that religious exemptions need not privilege religion or assume the goodness of religion, but rather that exemption regimes help counterbalance religion's disadvantaged role in political deliberation. If exemptions were justified with this kind of rationale, then the justification would not be grounded in an assumption about religion being a special good or more valuable than other conceptions of the good, rather it would be grounded on the assumption that religious reasons are disadvantaged in political deliberation and due to this disadvantage they have a special status.¹⁶ Then of course we would want to say that other comprehensive views have the same status, but religious reasons are the paradigm case of non-public reason and fairly easily identifiable as such.

Micah Schwartzman has called the above kind of view 'exclusive accommodation view'. The exclusive accommodation view holds that "religious convictions are special for justifying political and legal decisions *and* for purposes of accommodation"

¹⁵ Note that the convergence account advocated by Gaus and Vallier rejects symmetry between reasons that *support* and reasons that *reject* policies. These convergence theorists thus do not run into this kind of justification problem. According to Gaus and Vallier, exemptions can function to accommodate minorities of citizens who have defeaters for otherwise publicly justified laws. Indeed in Vallier's new book: *Beyond Separation*, Vallier advocates for an extensive exemption regime. See (Vallier 2014, chapter 6)

¹⁶ For a short discussion of this rationale see Peter Jones: http://www.religionandsociety.org.uk/uploads/docs/2012_06/1339510501_Discrimination,_Exemption,_and_Non-Religious_Belief.pdf, See also (Greene 2004:2096): "If we are to impose even a limited gag rule on religious arguments, then we must offset that with a limited system of exit options."

(Schwartzman 2018:1367, my italics). One response that Schwartzman offers to this kind of view is that it is in a sense legitimacy undermining:

[...] exclusive accommodation should be rejected because it rests on a defective conception of political legitimacy. The exclusion of certain values and beliefs from the political process does not entitle those who hold them to constitutional remedies. They are only so entitled if they can show that their views satisfy some further principle of legitimacy. One such principle states that values, principles, and beliefs are admissible as political and legal justifications only if reasonable people could, at least in principle, understand and accept them as free and equal citizens in a liberal democracy (Schwartzman 2013:1394)

According to Schwartzman, by introducing exemptions we are now allowing religious reasons to function as justificatory reasons, but that seems to undermine the rationale for excluding these reasons as appropriate justificatory reasons in the first place.

Here one may respond, on behalf of the defender of religious exemptions, that it is not the religious reason as such that is doing the justificatory work. Exemption regimes do allow religious reasons into the public sphere, but not in ways that would necessarily be objectionable to the public reason advocate. To see why, we can turn to an example that Cecile Laborde provides of a religious objector who believes that God commands her to do action X, which is hindered by a generally applicable law:

[...] the [objector] does not require that others believe or even understand X, but simply that they accept that their public commitment to free exercise may require them to allow [the objector] to do X. So here we have an example of a private reason [the objector's reason to do X], becoming a public reason [...] via appeal to the widely accepted secular value of 'freedom of religion'. (Laborde 2013: 182-83)

Of course, accommodating the objector might place a burden on reasonable citizens who disagree with X and the reasons that support X. Citizens may thus object that the state is allowing religious citizens to impose their religious reasons for X on them. X may be refraining from vaccinating one's school children with a state mandatory Rubella vaccine. The religious reasons for X may be that using a vaccine that has been developed with the use of tissue from aborted fetuses is a sin. By not vaccinating their children, the religious citizens are putting others in their community at risk. While the

objector's imposition of such a risk on fellow reasonable citizens may not in a *direct* sense constitute state coercion by use of non-public reasons, it may still constitute a form of imposition of comprehensive views on fellow reasonable citizens. The question then is whether the boundaries for religious exemption regimes can be drawn such that this kind of imposition is largely avoided. Whether exemption regimes are viable or justifiable (even in terms of public reason) seems to rely in great part on the delineation of boundaries for such an exemption regime.

Another problem arises with the actual adjudication of religious exemption claims in courts. How should courts deliberate on these exemption cases that revolves around the objectors' religious reasons? Religious exemption cases concern the basic rights (free exercise) of citizens and judges and justices must deliberate in terms of public reason. The public reason norm in this case has the implication that courts cannot resolve religious questions. If courts get involved in resolving religious questions, they would have to make certain judgments that would likely violate the constraint that they are to remain neutral between reasonable comprehensive worldviews and that they reason in accordance with shared, public standards of inquiry. A widely accepted judicial standard, the "hands-off religion approach" or "religious questions doctrine", does indeed say that courts should not resolve religious questions. The standard is usually justified in terms of commitments to religious neutrality or non-establishment (I review the most common rationales in my third paper), but public reason is also a viable rationale.

In my third paper, I propose a boundary for the hands-off approach as it applies in religious exemption cases: the religious evidence rule. The religious evidence rule says that the hands-off approach should apply to the factual claims of religious objectors only insofar as these factual claims are based on religious evidence. Factual claims put forth by religious objectors that are based on non-religious evidence should not be shielded from merit-judgment, i.e. from courts assessing their truth, reasonableness, consistency etc. While this rule may appear obvious, the paper illustrates how perplexity has existed both in court rooms and in news and academic commentary regarding the issue of how courts should treat factual claims put forth by religious objectors.

The religious evidence rule provides some clarity to the question of when religious objectors may rely on factually erroneous or unscientific claims and when courts may subject such claims to merit-judgment. The rule is offered as a modest contribution to the larger project of deciphering the limits of hands-off practice in religious exemption cases. As I have mentioned, the viability and justifiability of exemption regimes relies (in large part) on how the boundaries of such a regime are drawn.

4. Beyond the “politics of omission”?

So far, I have outlined some of the problems that arise from public reason’s exclusion of religious reasons and pointed to religious exemptions as an (imperfect) compensation for such exclusion. Furthermore, I have suggested that privileging certain epistemic standards (such as non-controversial science) may likewise be problematically exclusionary.

The exclusion challenge is inherent to the Rawlsian public reason project: drawing boundaries between public and non-public is a contentious exercise: “we disagree deeply [about] where the wall of separation, if indeed there must be one, should be” (Talisie 2009:149) We are bound to disagree about what should be in and what should be out in terms of the shared pool of values and standards of inquiry and on the desirability or coherence of the public reason standard itself.

Robert Talisie has recently put forth a very interesting justificatory argument that he claims overcomes the Rawlsian exclusion challenge or what Talisie calls “the politics of omission”. Talisie argues that liberal democracy can be justified with reference to basic *epistemic* norms that all reasonable citizens share. In making this argument, Talisie employs a much broader notion of reasonableness than Rawls, an epistemic notion of the term which counts all but those who are basically epistemically debilitated or cognitively dysfunctional as reasonable. Talisie argues that an epistemic justification of key liberal democratic institutions exists that can be endorsed by all reasonable citizens thus defined. It is therefore a justification that avoids the idealization of citizens that restricts diversity by setting the bar for reasonableness high. It is also a justification that

purports to accommodate the fact of reasonable pluralism without bracketing truth. In public reason appeal to the truth of comprehensive views is off-limits. In Talisse's justificatory approach, the pursuit of truth takes center stage.

The basic idea in Talisse's proposal is that citizens' commitment to truth –whatever their comprehensive worldviews may be- will compel them “to engage in certain epistemic activities that can exist and thrive only within a democratic political context.”(Talisse 2009:149) Citizens share certain basic epistemic norms: they aim at believing truly and must thus be committed to reasons and evidence-responsiveness, this in turn commits them to the kind of social process of reason and evidence exchange that is possible only under liberal democratic democratic institutions.

We argue that Talisse's justificatory approach is not sufficiently sensitive to the depth of epistemic disagreements that are to be found in pluralistic liberal democracies. From a first-personal perspective (the perspective of Talisse's justificatory approach) citizens need not be rationally committed to reason-exchange when such reason-exchange would occur between groups subscribing to very different epistemic norms and principles. Hence, we argue, Talisse's epistemic justification of liberal democracy fails as a public justification approach, since it is reasonably rejectable.

5. Strategy of inquiry

An immense philosophical literature exists on the idea of public justification in its various forms. Why do the articles in the dissertation focus on Rawls rather than the (sometimes overlapping) discourse ethics approaches, pragmatist approaches, critical theory? First of all, I am simply limiting my scope. Several dissertations could have been written on my overall topic of concern: the role of scientific and religious reasons in public reason and indeed if I were to write some of these dissertations, I surely would include some of these literatures. However, other reasons play a part too.

As I have already mentioned, Rawls's public reason account has had a tremendous influence on the literature on the role of religion in public justification and or deliberation. Much literature (including current literature) on this topic has developed

either as a reaction to and/or in inspiration of Rawls's account. Criticizing this approach is thus a way of providing input to contemporary discussions on religious reasons and legitimacy. My project has primarily been a negative one. The aim of the article on sincerity, for example, was to show that the sincerity problem poses a serious challenge to the wide view of public reason: a challenge that has not yet been overcome. Theorists who defend Rawlsian public reason must show how their theories overcome this challenge. I would conjecture that only a much reconstructed version of the Rawlsian public reason account can overcome the sincerity challenge. A positive project that examines how a reconstructed or a rather different public reason framework may overcome the sincerity challenge would need to address recent work such as Habermas' translation proposal (Habermas 2006) and Lafont's mutual accountability proposal (Lafont 2009).

The dissertation's second article that examines the role of science in public reason is also a negative project aimed at revealing some gaps and tensions in Rawls's account. Rawls addressed the science question in short, confident terms. The implicit assumptions about scientific reasoning that appear to underlie the confident conclusions are very interesting though. In our article, we showed that the assumption that science is public in a way that makes it uniquely suitable for guiding and informing public reason is harder to justify than one may think. The scope of our article is again narrow, our focus is on Rawlsian public reason and how this particular framework articulates and justifies the role of scientific reasoning in public deliberation. We therefore set aside literatures from different traditions such as the science and technology studies (STS) literature. The literature that concerns the specific question of determining the role of science in Rawlsian public reason is surprisingly small. Whether and how a privileged role for science can be justified in a Rawlsian public reason account is therefore still a very open question. Our negative project is meant as a modest contribution to filling this gap in the literature.

Rawls is known for his reflections on and use of the method of *reflective equilibrium*. Reflective equilibrium is the idea of seeking coherence between "considered convictions at all levels of generality" (Rawls 2005: 8 fn. 8). Rawls follows Norman

Daniels (Daniels 1979) in distinguishing between narrow and wide reflective equilibrium. Narrow reflective equilibrium is limited to seeking coherence between considered moral judgments about particular cases and moral principles, in wide reflective equilibrium background theories are included. The successful justification of political principles in wide reflective equilibrium depends on how well these principles cohere with other beliefs from pre-theoretical moral judgments or intuitions and judgments about particular cases to theoretical rules and principles, background theories and non-moral facts. In the dissertation, I use the same method of reflective equilibrium to test some of Rawls's principles, ideas or rationales from Rawls's perspective. For example, the science article reveals tensions between Rawls various commitments, the scientific standard stricture is in tension with more central commitments and commitments that have more explanatory power, so it seems that the stricture must be revised or discarded.

Rawls's public reason account is worked out in *ideal theory*. It is worked out for a well-ordered society in which citizens are reasonable and subscribe to reasonable worldviews that support political conceptions of justice. The idea is that after working out conceptions of legitimacy and ideals of democratic citizenship in ideal theory, we can move on to work out which paths may be available to pursue these ideals under less favorable conditions.¹⁷ But even if we grant that such obstacles as the sincerity challenge could be resolved in ideal theory, it is unclear whether this ideal can provide us with any guidance on how to take on divisive issues like abortion and same-sex marriage under non-ideal conditions under which non-compliance and insincerity is widespread. We have argued that even in ideal conditions, confirmation bias will occur unless normal cognitive functions are idealized which would be a questionable move. In real world politics, we can expect both bias and disingenuousness to be involved when 'public' reasons are employed and as we argue in our first article, bias and insincerity may lead to polarization as well as obfuscation of policy issues. So where does that

¹⁷ Rawls believed that under less favorable conditions the requirements of public reason could be loosened. Under certain less ideal conditions citizens may reason from their non-public comprehensive views "for the sake of the ideal of public reason" (Rawls 2005: 251) that is for the sake of developing shared political values.

leave us in the real world? Pursuing Rawlsian public reason does not appear to offer a very promising route for securing legitimacy under such conditions.

The dissertation has a narrow scope. Its main focus is on revealing difficulties in justifying public reason ideals of religious restraint and scientific privilege; ideals that enjoy wide acceptance in both political liberal theory and to a certain extent in real world politics. I hope that the negative findings provide a piece of the puzzle in the much larger positive project of determining the proper role of scientific and religious reasoning in public justification.

Introduction References

Audi, Robert and Wolterstorff, Nicholas. 1997. *Religion in the Public Square*. Landam, MD:Rowman & Littlefield

Daniels, Norman. 1979. 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', *Journal of Philosophy*, 76(5): 256–82

Douglas, Heather. 2015. Politics and Science: Untangling Values, Ideologies, and Reasons, *The ANNALS of the American Academy of Political and Social Science* , 658: 296-306

Eberle, Christopher J. 2002. *Religious Convictions in Liberal Politics*. New York: Cambridge University Press

Gaus, Gerald. 2003. *Contemporary Theories on Liberalism*. London: Sage

Greenawalt, Kent, 1987. *Conflicts of Law and Morality*, Oxford: Clarendon Press.

Greenawalt, Kent. 1995. Some Problems with Public Reason in John Rawls's Political Liberalism, 28 *Loy. L.A. L. Rev.* 1303

Greene, Abner S. 2004. Constitutional Reductionism: Rawls and the Religion Clauses. *Fordham Law Review*, Vol 72 Issue 5

Habermas, Jürgen. 2006. Religion in the Public Sphere, *European Journal of Philosophy*, Vol 14no.1, pp.1-25

Habermas, Jürgen. 2008. *Between Naturalism and Religion: Philosophical Essays*, Ciaran Cronin (trans.), Cambridge: Polity Press

Kappel, Klemens. 2012. 'The Problem of Deep Disagreement'. *Discipline Filosofiche*, Vol. XXII, No. 2, 2012, pp. 7-25.

Kappel, Klemens; Nielsen, Morten Ebbe Juul; Andersen, Martin Marchman; Jønch-Clausen, Karin. 2014. 'La neutralità liberale e il disaccordo fattuale', *Iride*, Vol. 27, No. 3, pp. 577-594.

Laborde, Cecile. 2013. Justificatory Secularism in Gavin D'Costa, Malcolm Evans, Tariq Modood, Julian Rivers (eds.) *Religion in a Liberal State: Cross-Disciplinary Reflections*. New York: Cambridge University Press

Larmore, Charles. 1996. *The Morals of Modernity*. New York: Cambridge University press

Perry, Michael 1988. *Morality, Politics and Law*, New York: Oxford University Press

Quong, Jonathan. 2011. *Liberalism without Perfection*. Oxford: Oxford University Press

Rawls, John. 1997. 'The Idea of Public Reason Revisited'. *The University of Chicago Law Review* 64: 765–807.

Rawls, John. 2005. *Political Liberalism*. Expanded ed. New York: Columbia University Press.

Rawls, John, and Samuel Richard Freeman. 1999. *Collected Papers*. Cambridge, Mass.: Harvard University Press.

Rorty, Richard. 1994. 'Religion as a conversation stopper', *Common Knowledge* 3 (1):1-6

Schwartzman, Micah. 2013. 'What if Religion isn't Special?' *University of Chicago Law Review*, Vol. 79, No. 4

Stout, Jeffrey. 2005. *Democracy and Tradition*. Princeton, NJ, USA: Princeton University Press

Talisce, Robert B. 2009. *Democracy and Moral Conflict*. Cambridge, UK ; New York: Cambridge University Press.

Vallier, Kevin. 2014. *Liberal Politics and Public Faith: Beyond Separation*, New York: Routledge

Weithman, Paul. 2002. *Religion and the Obligations of Citizenship*, Cambridge: Cambridge University Press.

Article Overview

The dissertation consists of four articles, I have introduced all four articles in the introduction, but to provide an overview, I will briefly summarize them.

1. Sincerity in the wide view of public reason: persistent challenges

In this article, we argue that Rawls's wide view of public reason still has not overcome a sincerity challenge. With input from Micah Schwartzman's work on sincerity, we illustrate the various problems associated with insincere political deliberation: 1) lack of due respect 2) sidetracking of important policy issues 3) irrational consequences and polarization. We argue that weak interpretation of Schwartzman's sincerity principle reproduces these concerns and a stronger interpretation sets requirements that cannot be met by normally functioning epistemic agents.

2. Scientific facts and methods in public reason

In his account on public reason, Rawls asserts what we will label the Scientific Standard Stricture (SSS): citizens engaged in public reason must be guided by non-controversial scientific methods and public reason must accord with non-controversial scientific conclusions. The Scientific Standard Stricture is meant to fulfill important tasks such as enabling the determinateness and publicity of the public reason framework. However, Rawls leaves us without elucidation with regard to when science is and is not "non-controversial" and more importantly, we are left without a justification for a stricture which excludes certain beliefs and methods of inquiry from the realm of political justification. In this article, we offer what we deem to be the most plausible interpretation of SSS. We then use Rawls's general theoretical framework to examine various potential justifications for privileging these "non-controversial" scientific methods and conclusions: 1) SSS facilitates the determinacy and completeness of public reason, 2) SSS must be accepted given a requirement of publicity, 3) abiding by SSS is part of what it means to be a reasonable person subscribing to reasonable worldviews, 4) there is no reasonable disagreement on the scientific standards

harbored in SSS, 5) SSS is included in Rawls's notion of rationality and finally, 6) the scientific standards harbored in SSS may be justified in virtue of being implicit in the public culture of liberal democracy. We conclude that no viable justification is available to Rawls.

This paper has been accepted for publication in *Res Publica*.

3. Factual claims in religious exemption cases: limiting the “hands-off religion” approach

The “hands off religion” approach, which says that the judiciary should not get involved in resolving religious disputes or assessing the merit of religious beliefs and practices, is generally accepted in US courts. However, the justification for the approach and its limits are not widely agreed upon. In this paper, I examine the approach as it is applied in religious exemption cases. In religious exemption cases, the objector's claims are subject to the hands-off approach, which means that while the courts can assess the sincerity of religious claims, they cannot subject religious claims to merit assessment (i.e. evaluate the claim's reasonableness, coherence etc.). The modest aim of this paper is to propose a simple limitation of the hands-off approach. I argue that the hands-off approach should apply to factual/empirical beliefs/reasons only insofar as these factual beliefs are based on religious evidence. I show that applying hands-off practice to factual claims that are not based on religious evidence exceeds the rationale for the hands-off approach. I further argue that while there are practical concerns with employing such a rule, they are outweighed by the practical concerns associated with not upholding such a rule.

4. Social epistemic liberalism and the problem of deep epistemic disagreement

Recently Robert B. Talisse has put forth a socio-epistemic justification of liberal democracy that he believes qualifies as a public justification in that it purportedly can be endorsed by all reasonable individuals. In avoiding narrow constraints on reasonableness, Talisse argues that he has in fact proposed a justification that crosses the boundaries of a wide range of religious,

philosophical and moral worldviews and in this way the justification is sufficiently pluralistic to overcome the challenges of reasonable pluralism familiar from Rawls. The fascinating argument that Talisse furthers is that if cognitively functional individuals were to reflect on some of their most basic epistemic commitments they could come to see that, in virtue of these commitments, they are also committed to endorsing key liberal democratic institutions. We argue that the socio-epistemic justification can be reasonably rejected on its own terms and thus fails as a public justification approach. This point is made by illustrating the significance of deep epistemic disagreements in liberal democracies.

This paper has been published in *Ethical Theory and Moral Practice*, Volume 18, Issue 2 (2015), Page 371-384.

Co-authorship

Three of the articles in the dissertation are co-authored by Klemens Kappel: Sincerity in public reason: Persistent challenges, Scientific facts and methods in public reason and Social epistemic liberalism and the problem of deep epistemic disagreement.

I am the first author and Klemens Kappel co-author on all three articles. I have been responsible for the writing of the papers and their content. Klemens Kappel has contributed with substantial critical discussion and comments on several drafts of the articles and has provided input on content, organization and design. Klemens furthermore contributed with the writing of section 4 in the article: Social epistemic liberalism and the problem of deep epistemic disagreement.

Sincerity in the wide view of public reason: persistent obstacles

Karin Jønch-Clausen and Klemens Kappel¹⁸

Public reason has a long tradition in philosophical and legal scholarship. Moreover, the general public reason idea: that coercive state power must be justifiable to those subject to it, is also at work in our actual political and judicial practices. We assume that judges, when deciding on binding laws, will set aside personal values and convictions and argue from a public standpoint. To a great extent, we expect the same of our legislators and in contemporary American politics we will, for example, see that legislators will refrain from drawing on controversial religious arguments when debating religiously contentious subjects.

One concern that has been raised about the restraint imposed by public reason is that it may invite insincerity. The concern is fairly obvious: asking individuals to set aside a set of (often strongly held) beliefs or reasons about a given subject matter and employing instead a special kind of “allowed” reasons is putting earnestness in jeopardy. Being obvious as it is, the sincerity concern has been anticipated by public reason theorists most of whom include some kind of *sincerity principle* in their accounts of public reason. It is widely agreed that the public reason obligation has only been fulfilled if those offering public reasons believe that the reasons they are offering are indeed public and that they are good reasons, good enough to justify the law or policy in question.

There are, however, many ways of spelling out this obligation and few have made the effort to carefully articulate the sincerity principle harbored in their particular account of public reason. Fortunately, Micah Schwartzman has taken up part of this important task

¹⁸ Earlier versions of this paper was presented at the workshop ‘Factual Disagreement and Legitimacy’ December 17-17 2013 and at the workshop ‘On compromise and Legitimacy’ August 18-19 2014 at the University of Copenhagen. We would like to thank the participants at these workshops for their valuable comments on the paper. We would also like to thank Sune Lægaard for suggestions and substantial criticism.

by carefully articulating the sincerity principle that he believes should be integral to the 'wide view of public reason', the prominent account of public reason developed by the later Rawls. In the wide view of public reason, citizens may employ comprehensive views in their political deliberation provided that proper (non-sectarian) public reasons are forthcoming. Schwartzman argues that in the wide view of public reason "A ought to advocate proposal p if, and only if, A (i) believes that $(R1 \rightarrow p)$, and (ii) publicly asserts $R1$ as sufficient to justify p " (Schwartzman 2011: 385).

In this paper, we argue that while Schwartzman offers a very illuminating account of sincerity for the wide view of public reason and illustrates neatly the various problems associated with insincere political deliberation, his sincerity principle is ultimately unsuccessful. Depending on interpretation, it is either impossible to meet due to our cognitive limitations, or it is very easily met, but too weak to properly address the problems associated with insincere political deliberation.

To make this argument, we will first use a real-life example to show how insincere political deliberation causes problems that we should be concerned about (1): lack of due respect (1.1), distortion and side-tracking of important policy issues (1.2), irrational outcomes (1.3) and polarization (1.4). Then Schwartzman's articulation of a sincerity principle designed to address these concerns will be reviewed (2). After reviewing Schwartzman's sincerity principle, we analyze in great detail an example given by Schwartzman of a pro-life advocate, who is openly religiously motivated but who, according to Schwartzman, offers sincere public reasons for an anti-abortion agenda. We use this example to illustrate some ambiguities and problems with Schwartzman's articulation of a sincerity principle for the wide view of public reason (3). Finally, we argue that two interpretations of SPJ are available: a strong version of SPJ which is impossible to meet due to the cognitive and psychological limitations of normally functioning human agents and a weak version which is fairly easy to meet, but which is unable to address the motivation adduced for a sincerity principle (4).

Our scope will be limited in the following ways: Firstly, we follow Schwartzman in focusing on the wide view of public reason defended by Rawls. The wide view belongs to the family of consensus-based public reason accounts: roughly the accounts of public

reason that insist on public reasons being mutually shared reasons. The consensus view has been challenged by advocates of convergence-based public reason, who argue (very roughly again) that proper public justification requires convergence of outcome, not consensus on reasons. Since prominent convergence theorists (such as Jeffrey Stout, Gerald Gaus and Kevin Vallier) operate with a very different view of public justification we will, for purposes of simplicity and our limited scope, set these very important contributions aside. Secondly, we set aside the discussion concerning public reason derived obligations of ordinary citizens. This omission may seem suspect, since most discussions of public reason, including Schwartzman's, tend to focus on ordinary citizens and much less on public officials. Focusing on officials, however, allows us to zoom in on the least controversial aspect of public reason: the idea that public officials have public reason obligations is widely accepted both within and outside of academia. A further reason for setting aside the discussion about the obligations of ordinary citizens is that whether or not citizens have certain public reason obligations does not make a difference to our main arguments. Our discussion will therefore mainly concern the obligation of public officials, in particular the obligations of legislators in contemporary American politics. Emphasis will be on the paradigm public reason discussion: the role of religious reasons in politics.

1. Problems with insincere political deliberation

Insincere political deliberation has many faces. We are interested in the kind of insincerity involved when a legislator employs what is meant to appear as good, public reasons, while the legislator in fact does not believe that the reasons employed have an adequate degree of publicity. i.e. when the legislator does not in fact believe that she has provided a public reason and/or when the legislator does not believe that she has provided a good or sufficient reason for the law or policy in question.

In order to get a better idea of the problems associated with insincerity in political deliberation, it might be helpful to start with an example. Across the United States many abortion/reproductive health clinics are being closed or are facing closure due to new laws, the so-called Targeted Regulation on Abortion Providers (TRAP) laws, requiring

abortion clinics to have admitting privileges at a nearby hospital and/or requiring abortion clinics to meet ambulatory surgical center standards. The reasons that legislators have used to support these laws solely concern the safety of patients in reproductive health clinics. Thus, in the case of TRAP-laws, on the face of it, the legislators are abiding by the strictures of public reason. They have set aside controversial religious reasons and are instead employing reasons that all reasonable citizens could potentially adopt: the safety of patients in reproductive health clinics. However, opponents of the law have charged legislators of manipulation, basing laws on insincere reasoning that they themselves are not persuaded by, rather than basing them on their purported (non-public) religious reasons. If their opponents are right, the legislators have not been sincere in their reasoning. They have offered manipulative or strategic reasons instead of their “real” often religious reasons for implementing these new laws.

Why do opponents think that the reasons being proposed are insincere? TRAP-law opponents have pointed out that acquiring admitting privileges at a nearby hospital is superfluous in terms of patient safety, since in rare cases of emergency hospitals will accept patients regardless of whether or not they have undergone treatment at the clinics in question. Opponents further argue that admitting privileges and the high facility standards required by TRAP-laws do not apply to other clinics in which far riskier surgical procedures are being performed and no attempt is being made to extend TRAP-law requirements to these clinics. TRAP-law opponents often bring up these inconsistencies when charging legislators of insincerity. The implicit argument is that since the weaknesses and inconsistencies in the reasons offered are so blatant, the best explanation is that the proponents do not actually believe the reasons they propose.¹⁹ Legislators are thus being charged of being insincere with regard to their knowingly faulty reasons concerning women’s health and safety, using this concern strategically to further an anti-abortion agenda: an agenda that, to a great extent, is grounded in sectarian religious views about the fetus. If sincerity is integral to public reason, then

¹⁹ <http://www.latimes.com/opinion/op-ed/la-oe-borgmann-abortion-threats-20141201-story.html>;
<http://www.nytimes.com/2014/10/04/us/at-texas-abortion-clinic-staff-and-patients-grapple-with-court-ruling.html?mabReward=RI%3A10&action=click&contentCollection=U.S.®ion=Footer&module=Recommendation&src=recg&pgtype=article>

having violated the sincerity requirement, we may say that these legislators have not provided public reasons for TRAP-laws at all.

1.1 Lack of due respect

Assume for the sake of argument that the opponents of TRAP-laws are right. Why should we be concerned with legislators proposing and passing these binding laws with the use of insincere reasons? Firstly, one may hold that providing insincere reasons means failing to treat citizens with due respect. Schwartzman argues that disrespect is one of the problems associated with insincere deliberation “Those who engage in political advocacy without satisfying [a sincerity] requirement violate the duty of civility. They fail to justify their political claims to others and so demonstrate a lack of respect for the reasonableness of their fellow citizens.”(Schwartzman 2011:386). In the TRAP-law case, the situation may be the following: legislators who propose these laws are employing reasons that they themselves do not find to be good or sufficient to justify the proposed laws, and reasons that they do not believe that reasonable citizens should endorse upon reflection. They are thus demonstrating lack of respect for the reasonableness of these fellow citizens.

1.2 Distortion and side-tracking of important policy issues

Another reason for concern is that insincere political deliberation may diminish the quality of political deliberation. There are several ways by which the quality of political deliberation may be diminished. Firstly, when legislators publicly assert reasons that they do not find to be good reasons, then deliberation will shift away from the real policy issue of concern. In the TRAP-law case, political deliberation will concern whether or not abortion clinics pose a threat to women’s health rather than the underlying and real policy question at stake: whether abortion should be further restricted and if so how. Certainly, there will usually be reasonable arguments to be made by both those who favor more and those who favor less restriction. When the real issue of concern is side-tracked, these reasonable arguments will no longer take center stage and chances for enhancing mutual understanding between disagreeing parties and

for exploring middle ground territory dwindle.

1.3 Irrational outcomes

It seems fair to speculate that basing laws on insincere reasons carries some risk of leading to irrational outcomes. We could, for example, imagine reproductive health clinics shutting down some of their services that *do not* pertain to abortion (for example preventative cancer care) in order to afford the costs of upgrading to ambulatory surgical procedure center standards. We could likewise imagine reproductive health clinic shutting down vital non-abortion services in order to afford moving to a more expensive address close to a hospital that will grant admitting privileges. Such action would respond reasonably to the reasons grounding the law, but would nonetheless be in the interest of no one.

1.4 Polarization

Finally, citizens and legislators wary of insincere reasoning may become distrustful of each other and the arguments presented by the other side. Growing distrust could lead to polarization, as suggested by Schwartzman (Schwartzman 2011:392). In the TRAP-law case, we can imagine opponents of the laws becoming more distrustful of and hostile toward their opponents' views and thereby more deaf to reasonable arguments in favor of more restrictive abortion laws. Consequently, TRAP-law opponents could end up taking a more extreme open-access position as a result of the insincere arguments being addressed to the public.

In light of these concerns, it seems clear that reasons that are not sincerely endorsed by those who employ them should be excluded from the realm of public reason. It is also clear that Rawls meant to exclude such reasons, but he offered only hints at a sincerity principle. Schwartzman uses these hints to develop a fleshed-out sincerity principle for the wide view of public reason.

2. Sincerity in the wide view of public reason

Before examining sincerity in the wide view of public reason, it will be helpful to briefly review the public reason obligation as it is articulated in the wide view of public reason. When Rawls first developed his account of public reason, he was met with a storm of criticism from friends and foes of political liberalism, who found the view to be unjustifiably exclusionary of religious citizens. In the first articulation, comprehensive views (including religious reasons) were excluded entirely from playing a role in the deliberation on coercive (fundamental) laws and policies. In response to the criticism, Rawls developed the account making it more accommodating to religious reasons. The wide view of public reason includes the *proviso* which says that in political deliberation on coercive laws and policies, citizens are allowed to draw upon comprehensive views so long as in *due course* proper public reasons, sufficient to support whatever the comprehensive view is said to support, will be offered (Rawls: 784).

An ambiguity in the proviso concerns how we should understand “in due course”. We would agree with Cristina Lafont when she writes that although much suggests that the reasons should be offered sooner, “the latest possible time would be when the legislative decisions are made” (Lafont 2007: 240). Ultimately, all binding laws must be justified by proper public reasons. Legislators proposing binding bills on political essentials (like abortion) certainly are beyond the ‘due course’ threshold.

While Rawls does not unfold a sincerity principle himself, he does state that public reasons must be offered “in good faith” and that “we must sincerely believe that the reasons we would offer for our political action [...] are sufficient”(Rawls 1997:771). Finally, it is not enough for the public reasoner to sincerely believe that the reason is sufficient from the perspective someone else. The reason offered must be believed to be shared. A legislator must believe that the reasons she offers draws on values and methods of evidence that are widely accepted, and she must believe that her reason is a good reason from her own point of view *and* from the point of view of other reasonable citizens. Rawls welcomes the method of reasoning from conjecture, that is the method

of arguing from what we believe are other people's basic worldviews and belief-systems, as an aid in improving understanding among citizens engaged in public reason. However, Rawls also clearly states that reasoning from conjecture does not express a form of public reasoning (Rawls 1997: 786). A sincere public reason is thus offered in good faith, it is believed to be a shared reason and the individual offering the reason accepts it and believes that the reason is sufficient to justify the law or policy in question. Rawls does not go into much more detail, so at best this would amount to a rather ambiguous sincerity principle. Schwartzman basically picks up where Rawls left off and develops a much more worked out version.

2.1 Disclosure

Firstly, Schwartzman specifies what he deems to be the required level of publicity for a public reason to be properly sincere. Recall the person who offers the reason must sincerely believe 1) that the reason is indeed a public and thus a shared reason and 2) that the reason is sufficient to justify the law in question. According to Schwartzman, one can only reasonably assess whether the justificatory reason is shared (and thus properly public), if the reason is *disclosed* in political deliberation. When public reasons grounding coercive laws are disclosed, they are open to scrutiny and the assessment of whether the reason is indeed public in the right way does not lie merely with those who are employing the reasons, but with the political community at large.²⁰ By insisting on disclosure, Schwartzman is bringing into his account of a sincerity principle, an important aspect of Rawlsian publicity: coercive laws must not only be justifiable to all reasonable citizens, *the way by which* they are publicly justified must be available to citizens as well. Schwartzman thus builds a requirement of disclosure into his principle of sincerity and articulates his sincerity principle in the following way:

²⁰ Skeptics of public sincerity argue that disclosure requirements would obstruct desirable strategic, consensus-building in politics (Reidy 2000: 60) Schwartzman response to this kind of argument is that fruitful consensus-building in politics requires a kind of trust between participants of political deliberation that is lacking when participants expect others to argue strategically by remaining silent about critical justificatory reasons and further that when disclosure is not required, citizens or officials cannot reasonably judge whether or not their political decisions are publicly justified, since the justifying public reasons are not put to the test in a process of reason-exchange. Since this discussion is not directly relevant to my main arguments, we will set it aside for now.

Principle of sincere public justification (SPJ): *A* ought to advocate proposal *p* if, and only if, *A* (i) believes that ($R1 \rightarrow p$), and (ii) publicly asserts *R1* as sufficient to justify *p*. (Schwartzman 2011: 385)

2.2 Sufficiency

Under SPJ *A* may only advocate policy *p* if she believes that her public reason(s) *R1* are sufficient to justify *p*. What precisely does Schwartzman mean by sufficient? On this particular issue Schwartzman is not entirely clear. He does however seem to pack a lot into the sufficiency requirement. We will here outline what Schwartzman says explicitly about sufficiency as well as (what we take to be) his implicit assumptions. Firstly, sufficiency requires that the reason is shared:

When engaging in political advocacy, citizens must believe they have sufficient public reason to support their political decisions. They cannot rely for the purposes of political justification on reasons they find implausible or inadequate, even though others might be persuaded to accept those reasons (Schwartzman 2011:385)

To be more precise, we may say that *A* must believe that *R1* is shared which means that *R1* draws on widely shared considerations (political values and methods of reasoning) and she must find the reason to be good from her own point of view and from the point of view of other reasonable citizens. Schwartzman adds in a footnote that “[the person obliged to offer public reasons] is not obligated to give the best possible reason(s). Although it might be desirable to provide such reasons, it may be difficult, if not impossible, to fulfill that demand given reasonable limits on our epistemic capacities.” (Schwartzman 2011:385, fn.29)

We attribute an additional implicit assumption to Schwartzman (and Rawls): *A*’s reason *R1* must provide a strong *enough* justification of the given law or policy. This means that *A* cannot have another *countervailing* reason that overrides her public reason²¹.

An aspect that Rawls was silent about was whether a sufficient public reason must be

²¹ *A* could, however, admit that there might be other reasons for her proposed policy, or that she privately thinks that other non-shared reasons supporting the policy are even stronger.

one that the reason-holder is also motivated by. David Reidy has argued that a plausible reading of Rawls must include a weak version of such a requirement. Reidy suggests the following interpretation:

When it comes to fundamental political issues, citizens and officials must take and vote only for positions that they themselves sincerely believe to be justified by some public reason(s) that they have identified. As a descriptive psychological matter, they need not be motivated by these or any other public reasons. But when it comes to fundamental political issues they must be able at least to imagine themselves being motivated (in the absence of actually motivating non-public reasons) by public reason(s) to take the positions or cast the votes they in fact take or cast. A citizen or official unable to imagine herself being so motivated simply does not sincerely believe that she has a good and sufficient public reason or a public justification for her position or vote. (Reidy 2000:57-58)

Micah Schwartzman agrees with Reidy in insisting that those who employ public reasons must believe that they would pass this kind of hypothetical motivation test. Rather than understanding this test as a separate motivation requirement, he argues that we should simply see it 'a way of checking whether a person sincerely believes that public reason is sufficient.' (Schwartzman 2011:395). At the same time, Schwartzman stresses that such hypothetical motivation must be distinguished from *actual*²² motivation, which is not required in the wide view of public reason. As Schwartzman puts it:

[...] political liberalism does not require actual motivation. The idea of an overlapping consensus presupposes that people have different reasons for affirming public values and ways of reasoning. [...] Provided citizens are reasonable, political liberalism does not ask how they relate public political values to their comprehensive views. It simply assumes that they will find ways of making their diverse perspectives compatible with a reasonable political conception of justice. Given that people will differ in

²² The most prominent defender of a stronger 'actual motivation' requirement in public reason is Robert Audi. Robert Audi argues that, in political contexts, you may give religious reasons only when you endorse (and can formulate) a secular reason for the same policy that sufficiently motivates your political advocacy or support. Audi spells out the motivation requirement in the following way: "Sufficiency of motivation [...] implies that some set of secular reasons is motivationally sufficient, roughly in the sense that (a) this set of reasons explains one's action and (b) one would act on it even if, other things remaining equal, one's other reasons were eliminated." (Audi 2000:96) I will show how Schwartzman's weaker motivation requirement insists on b), but not on a).

how they integrate their comprehensive and political views, a demand for shared motivations is unjustifiably exclusionary. It would be enough for citizens to offer public reasons that they sincerely believe are sufficient but that are not necessarily their final or ultimate source of motivation. (Schwartzman 2011:389)²³

Schwartzman argues that ‘a person can sincerely believe a reason without being directly moved by it’ (Schwartzman 2011:388) According to Schwartzman, religious commitments can function as the primary or ultimate source of motivation, so long as the public reasoner can (and does) offer sufficient public reasons. Inspired by a Weithman example (Weithman 1991: 59-60) Schwartzman introduces us to Beth, a pro-life activist who holds religious convictions about life beginning at conception and whose advocacy is motivated by such religious beliefs. Beth also believes abortion ‘diminishes respect for human life, runs counter to the value of protecting the vulnerable, and disregards the genetic identity of the fetus’ (Schwartzman 2011:388). Beth thinks that these reasons ‘rest on political values’ and ‘stand on their own merits’ (Schwartzman 2011:388). Beth is committed to the idea that coercive laws and policies should be grounded in public reason and she offers these public reasons in her advocacy while being open about her religious motivation. In sum, Beth feels that binding laws must be supported by public (shared) reasons, she thinks that she has such reasons and she believes that the public reasons she offers are sufficient to ground her policy proposal. We have learned that the sufficiency requirement includes the hypothetical motivation test. We therefore add that while Beth’s actual motivation to further her pro-life advocacy is grounded in religious beliefs, Beth is able to imagine being motivated by her public reasons. So while Beth’s public reasons are not really what motivates her political action, she must be able to imagine that “in the absence of [her] actually motivating non-public reasons (Reidy 2000:57), her public reasons *would* motivate her to pursue the same political action.

²³ Here Schwartzman is using the term ‘actual’ and ‘shared’ motivations interchangeably. The idea is that while the public reasoner cannot rely on convergence justification when it comes to the merit of her public reason, she *can* rely on convergence justification with regards to the motivation for that reason, that is, she can hold that she is motivated by her comprehensive doctrine as long as she reasonably believes that citizens with different comprehensive doctrines would be motivated from the perspective of their comprehensive doctrine(s)

In the following, we would like to take Beth and her purported public reasons as a starting point and examine more closely how it is that Beth is in abidance with SPJ (if she is). Before turning to this question, it might be helpful to state a full version of SPJ that more explicitly includes the implicit assumptions that we have laid out:

Principle of sincere public justification (SPJ): *A* ought to advocate proposal *p* if, and only if:

- (i) *A* believes *RI* is sufficient to justify policy *p*, where ‘sufficient’ means
 - a)* *A* endorses *RI* and believes that other reasonable citizens could endorse *RI*
 - b)* *A* believes that *RI* can stand on its own in justifying *p* (i.e. it does not presuppose any particular comprehensive view)
 - c)* *A* could imagine being motivated by *RI* to pursue/advocate/support *p*²⁴
- (ii) *A* publicly asserts *RI* as sufficient to justify *p*

3. How is Beth in abidance with SPJ?

Since the discussion in this paper is focused on the moral duties of legislators, assume that Beth is a legislator involved in proposing a restrictive abortion law. Besides from Beth being a legislator, her attributes remain the same: Beth is ultimately religiously motivated, but she also believes that abortion ‘diminishes respect for human life, runs counter to the value of protecting the vulnerable, and disregards the genetic identity of the fetus.’ Since Beth wants to avoid unwarranted imposition of religious beliefs on her fellow citizens, she employs these reasons when publicly advocating her restrictive abortion proposal. For Beth to be in abidance with SPJ, she needs to believe that her set of public reasons are indeed shared reasons and that this set of shared reasons is sufficient to justify *p*.

In order to see how and why Beth is or is not in abidance with SPJ, we need first to address some ambiguities with regard to the role that Beth’s religious reasons and motivation plays in her advocacy.

²⁴ As Schwartzman also points out (Schwartzman 2011: 395), *c)* is not an independent requirement. It is entailed in *a) + b)*.

One ambiguity pertains to the ‘hypothetical motivation’ test that Beth must be able to pass in order for her to reasonably believe that her public reasons are sufficient. There could be different ways of spelling out this test in terms of different possible worlds in which Beth is motivated by her public reasons. Here are three different options. The test requires that there is:

- a) a possible world in which Beth is motivated by both her public reasons and her religious reasons
- b) a possible world in which Beth subscribes to both sets of reasons, but is motivated by her public reasons alone and finally,
- c) a possible world in which Beth does not subscribe to her religious reasons and Beth is motivated by her public reasons.

It appears that Schwartzman has c) in mind. We make this assumption due to the following remarks that Schwartzman makes about the hypothetical motivation test: “[the public reasoner] should ask whether she would still defend her view if she was not motivated by her religious convictions “. This remark rules out a). In the possible world Schwartzman has in mind Beth is not motivated by her religious reasons. Schwartzman makes the further remark: “she needs to ask whether her position could be supported by those who do not share her religious convictions” and Schwartzman (2011:395). This remark rules out b), in the possible world Beth does not subscribe to her religious convictions. We are left with c): Beth must imagine a world in which she does not subscribe to her religious convictions and in which she is still motivated by her public reasons.

In a sense the motivation requirement is straightforward: if the legislator is concerned with religious imposition of those who do not share her religious commitments (as she should be), then the legislator should ask if she was one of the citizens who disagreed with or did not share her religious commitments, could she still imagine herself being motivated by her public reasons to move on with her bill?

This hypothetical motivation requirement is also a very plausible interpretation of Rawls. In the terms of political liberalism, the question is: does the legislator believe

that her reasons are necessarily dependent on (or presuppose) her own comprehensive doctrine or does she think that these reasons could motivate other reasonable citizens who subscribe to different reasonable comprehensive views: views that do not include these religious convictions?

If the answer is no, then Beth's proposed abortion law is not publicly justified to these citizens. However, if Schwartzman has c) in mind, he must show how he overcomes some (in the literature) well-known objections to political liberalism regarding the feasibility of bracketing deeply held convictions. We will discuss these in the following section.

3.1: Bracketing religious convictions: Cognitive limitations

This is how Greenawalt and Wolterstorff, in two much quoted passages, put the objection to the idea that public reasoners must be able to bracket their religious convictions:

To demand that many devout Catholics, Protestants, and Jews pluck out their religious convictions is to ask them how they would think about a critical moral problem if they started from scratch, disregarding what they presently take as basic premises of moral thought. Asking that people perform this exercise is not only unrealistic in the sense of impossible; the implicit demand that people try to compartmentalize beliefs that constitute some kind of unity in their approach to life is positively objectionable. (Greenawalt 1987:155)

What I come to believe is a function of my experience plus what I already believe. It is not just a function of my experience. The traditions into which we have been inducted cannot just be set on the shelf, cannot be circumvented. They have become components of ourselves as belief-forming agents: component of our programming. We live *inside* our traditions, not *alongside* (Wolterstorff 1997: 89)

According to Greenawalt and Wolterstorff's reasoning, Beth does not have the real option of stepping outside of her religious tradition and evaluate her beliefs or motivations from the perspective of someone holding different comprehensive views. Beth's religious convictions are part of her programming, they will inevitably play a role in forming the outcome of her thought experiment.

Micah Schwartzman argues to the contrary that it is fairly easy to bracket religious convictions and know whether a secular rationale is sincerely held. In response to Greenawalt's argument about the impossibility of carrying out this task, he says:

[...] political debates today, especially those at the constitutional level, are conducted mostly in non-religious terms. One might argue that such debates are merely a sham, and that competing comprehensive doctrines are lurking just beneath the surface. But even if political advocates argue in publicly accessible terms for prudential or strategic reasons, this shows that they are at least capable of discriminating among arguments for the purpose of public presentation. And if they are capable of this much, it seems doubtful that they are incapable of asking whether they sincerely believe the arguments they are presenting (Schwartzman 2011: 396)

Schwartzman adds that "it seems needlessly dismissive to suggest that religious believers are generally incapable of distinguishing between their reasons for action." (Schwartzman 2011:396).

In a certain sense, Schwartzman and Greenawalt/Wolterstorff appear to talk past each other here. It does seem obvious that religious citizens know when they are presenting what would be understood as a religious argument and when they are presenting what would or could be understood as a secular argument. Simply because presenting these arguments does not necessarily involve bracketing. The values expressed in these reasons may be abstract and vague to such a degree that they can be understood as secular, because they don't directly or verbally reference religion. Reasons based on human dignity may be presented as secular reasons, whereas reasons based on the holiness or sacredness of human life could not be presented as secular reasons and distinguishing between the two for the purpose of public presentation is fairly straightforward. But the fact that religious citizens actually discriminate between these reasons or values for the purpose of public presentation does not provide us with any evidence regarding these citizens' ability to evaluate their own sincerity which includes evaluating whether citizens who do not subscribe to religious worldviews would find the public reasons strong enough to support the political action in question.

Let us return to Beth. As we have mentioned, the hypothetical motivation test is indeed just a way of checking whether Beth's public reasons are problematically dependent on

Beth's comprehensive religious worldview. While public reasons should be supported by citizens' diverse reasonable worldviews, they cannot *presuppose* them. Beth needs to ask whether her public reasons would retain their normative force if they were not supported by religious evidence. Importantly, if Beth's justificatory reasons rely on Beth's comprehensive religious views, then these reasons are not secular reasons in Rawls's sense of the term and therefore they are not public. Rawls insists that public reasons must be secular²⁵ and he agrees with Audi in defining a secular reason as a reason "whose normative force does not evidentially depend on the existence of God or on theological considerations, or on the pronouncements of a person or institution qua religious authority."²⁶

Schwartzman's motivation test helps determine when the normative force of justificatory reasons depends on comprehensive views. Part of determining whether a justificatory reason is sufficient, is thus determining whether it is indeed public. So in asking about the sufficiency of Beth's justificatory reasons, we are not discussing a situation in which Beth is assessing the independent strength of a secular reason that she already subscribes to. We are not discussing the scenario under which Beth holds public reason *a* and religious reason *b* and is attempting to find out whether *a* is strong enough to justify policy *p*. We are discussing the scenario in which Beth is attempting to determine whether her justificatory reason *a* is indeed a public reason. Part of the sincerity requirement thus concerns the question of whether a justificatory reason is public.

We have seen that Schwartzman argues that the public reasoner should evaluate the normative force of her justificatory reasons from the perspective of someone who does

²⁵ But secular reasons and public reasons are not the same (Rawls 1997:775). While public reasons are secular, only a subset of secular reasons are public: a set that does not presuppose controversial moral and philosophical doctrines, are public reasons.

²⁶ Rawls writes in a footnote that he would agree with the stricture as it is expressed above so long as Audi does not mean that what is required is "secular reasons in the sense of a nonreligious comprehensive doctrine" (Rawls 1997:780 fn.), by which Rawls means reasons that essentially depend on God's non-existence. Such reasons would be non-public in a Rawlsian framework.

not subscribe to her religious beliefs. She must thus bracket her religious convictions. In this following, we will examine the bracketing requirement in Beth's case.

Beth needs to know whether her justificatory reason as expressed in 'abortion violates respect for human life' would retain its force if it did not depend on religious convictions, so in our case, she needs to know whether the normative force would be retained if souls were taken out of the picture. If Beth believes that fetuses are ensouled, she likely believes that the fetus' dignity and rights stem from this attribute. By bracketing the belief about the soul, she may also be bracketing big parts of her moral programming. Beth believes she lives in a world of ensouled human beings and this purported fact about human beings tells her a lot about how humans should be treated. She probably would be most honest in insisting that she cannot know what she would think about the human fetus if the fetus did not have this critical attribute.

What if Beth only has to remain agnostic about whether fetuses are ensouled? In that case, Beth may want to say that her anti-abortion stance can still be supported with her 'respect for human life' justificatory reason. She may reasonably think that if we don't know whether the fetus is an inviolable, ensouled creature, then certainly we would not want to risk harming this creature, because this creature *could* be ensouled. But of course, then she has not provided a secular and thus public reason.

The point about the cognitive difficulties involved in engaging in these thought experiments need not be dismissive of the abilities of religious citizens. In fact it need not be about religious citizens at all. It is merely a point about the possibility of bracketing deeply held convictions, convictions that are at the core of the individual's belief-system, when evaluating reasons or evidence.

The difficulty involved in carrying out this task may indeed become clearer if we use an example that does not involve religious reasoning. Think of a secular pro-lifer, Fatimah, who has reached her position on abortion because she has been persuaded by what Schwartzman calls the 'genetic argument' (Schwartzman: 375): the idea that from conception the zygote/embryo/fetus has its own unique human genetic make-up and

since the building blocks of a unique human being are present from conception, no non-arbitrary line can be drawn from the early stages of fetal development to the new born baby. Imagine now that the genetic argument has been deemed sectarian and out of the bounds of public reason. Imagine further that Fatimah is a legislator working on a restrictive anti-abortion bill and she justifies her anti-abortion stance with these justificatory reasons: abortion ‘diminishes respect for human life’ and ‘runs counter to the value of protecting the vulnerable’. Fatimah now has to determine whether these reasons are sincere, so she engages in the weak motivation test: she asks herself, would she still be motivated by her justificatory reasons if the fetus did not have this uniquely human genetic make-up or if she were to remain agnostic about this attribute? It seems that the belief about genetic make-up is so central to her understanding of the object of discussion, that it is impossible to reason about the fetus and not have this belief play a part. Just like Beth is unable to bracket beliefs about souls, Fatimah is unable to bracket beliefs about the uniquely human genetic make-up of the fetus.

Maybe Beth does not have to provide an ‘all the way down’ secular reason. In fact, such a requirement appears contrary to political liberalism. The whole idea of the overlapping consensus is that of citizens reaching the same political values from the pathways of their own diverse comprehensive doctrines. As Cecile Laborde puts it “Public reasons, *stricto sensu*, are sparse and ‘metaphysically thin’ [...they...] do not go deeply into ‘reasons for reasons’ (Laborde 2013:172). The interpretation of bracketing that we have employed in this section is most likely stronger than what Schwartzman had in mind and at likewise at odds with political liberalism.

We do, however, not see a way of carrying out the hypothetical motivation test that does not get into ‘reasons for reasons’. The hypothetical motivation test is about furnishing an abstract reason, here ‘the respect for human life’, with non-religious beliefs and then deciding whether in such an interpretation, the reason would still be motivating. There is no method of carrying out the thought experiment that avoids getting into reasons for reasons.

Rawls does not avoid reasons for reasons either. We have seen that secular reasons for Rawls are reasons whose normative force do not depend on religious evidence. So Rawls would very likely agree with Schwartzman (and Reidy) about including a kind of hypothetical motivation test in the wide view of public reason. Beth must undergo this test to find out whether the normative force of her abstract public reason lies almost solely with her belief in human souls and the sinfulness of destroying ensouled human life or whether the reason could retain its normative force if it was furnished with non-religious beliefs. It appears that we are stuck with bracketing and the problems that accompany bracketing.

3.2 Bracketing religious convictions: attempting vs. succeeding and the problem of confirmation bias

We may be stuck with bracketing, but maybe we need not require that public reasoners are successful in bracketing. A weaker and more realistic requirement may say that Beth need not *succeed* in bracketing her religious beliefs, but merely that she *attempts* to do so. Although we know that it is impossible for Beth to truly bracket her religious beliefs, we now merely require that she tries to do so. It appears that Schwartzman also has this distinction in mind when advocating the weak motivation test. Rather than succeeding in bracketing, Schwartzman talks of ‘a reasonable effort’. This is what Schwartzman says about attempting: “What counts as reasonable effort here is a difficult question. One answer is to say that citizens are not expected to expend as much effort as, say, legislators or executives. The expectations placed on judges may be even higher. But this is a large and complicated issue that I cannot pursue here.”

(Schwartzman 2011:395). Of course, trying harder to bracket does not necessarily mean getting closer to succeeding. Bracketing is not just a matter of effort; it is also matter of cognitive capability. Upon entering public office, Beth is not all of a sudden endowed with cognitive super powers. Beth is still only attempting to bracket religious beliefs and not succeeding.

Now what if Beth *attempts* to bracket her religious views and she evaluates an argument like the genetic argument and tries to find out whether such a secular

argument could indeed furnish her public reason concerning ‘respect for human life’? If Beth believed that the genetic argument was strong enough to stand alone in furnishing her justificatory reason about abortion violating the respect for life, then she has carried out the task of determining whether or not this justificatory reason is public. Indeed in Schwartzman’s example Beth is persuaded by the genetic argument. So maybe Beth could be in abidance with SPJ after all.

In evaluating this scenario, we should keep in mind that Beth already holds strong views about the sinfulness of destroying ensouled human life and since she is not able to fully bracket these convictions, it should not be surprising to us if she were inclined to be persuaded by the genetic argument. The general cognitive tendency of interpreting new information in ways partial to one’s preconceptions has been widely researched in social psychology and cognitive science and is referred to as confirmation bias. This term has been used to cover different phenomena. It covers the phenomenon of individuals’ tendency to seek new information that confirms preconceptions. The term is also used to cover the phenomenon of individuals’ “disinclination to abandon, a currently favored hypothesis” (Klayman 1995:385) or to evaluate evidence that confirms preconceptions positively (this phenomenon is also sometimes referred to as *prior attitude effect*). In political deliberation, confirmation bias has proven to have a stronger impact when individuals’ prior beliefs on the issue at stake are deeply entrenched or strongly held (Taber and Lodge 2006). Therefore, when individuals reason on vital matters, such as abortion, we should consider confirmation bias and prior attitude effect very likely.

4. SPJ: too weak or too strong

Given that people have a tendency toward confirmation bias, it should not be surprising to us if Beth, upon evaluating the genetic argument, finds this reason sufficient to furnish her abstract political values such as ‘the respect for human life’. She may thus have her public reason that can ground her abortion bill. So Beth might *very easily* meet the sincerity requirement: it was not difficult for Beth to find a secular argument that she considered to be very plausible and that she could imagine motivating her to move forward with her abortion bill.

Schwartzman argues out that religious citizens who engage with religiously contentious subject matter, should be aware of the potential of bias and the hypothetical motivation test is meant to address this problem (Schwartzman 2011: 395). But we have shown that Beth cannot successfully carry out the hypothetical motivation test and the question now is: is attempting to carry it out going to do the job? Is it going to address the concerns associated with insincere political deliberation?

4.1 Due Respect

Let us start by asking whether Beth has now shown her due respect to fellow secular citizens as autonomous moral persons with the capacity for moral reasoning. If we concede that Beth is not in a position to successfully bracket her religious views and we further acknowledge that her religious views are likely to impact her evaluation of secular reasons, then we don't have a very good case for arguing that Beth, by offering her three public reasons, has shown her due respect to fellow citizens who have drawn very different conclusions on this difficult issue. Beth is prone to bias on the question of determining how to weigh the rights of the fetus with the rights of the woman. She is not able to successfully keep religion out of this equation. It is not clear that Beth's constituents would be more respected by Beth offering her likely biased public reasons than by her offering non-public, religious reasons. Some have argued that offering non-public, religious reasons need not be disrespectful at all.²⁷ As Jeffrey Stout puts it

It might be thought that offering religious reasons, without supplementing them by appeal to the social contract, is inherently disrespectful. But why need this be a sign of disrespect at all? Suppose I tell you honestly why I favor a given policy, citing religious reasons. I then draw you into a Socratic conversation on the matter, take seriously the objections you raise against my premises, and make a concerted attempt to show you how your idiosyncratic premises give you reason to accept my conclusions. All the while, I take care to be sincere and avoid manipulating you (Stout 2005:72)

²⁷ See also (Wolterstorff 1997: 110-111)

Whether or not we agree fully with this argument, it does seem that if we look only at the issue of due respect, then Beth may well be showing less rather than more respect in offering her weakly sincere (likely biased) public reason than she would be in offering her sincere(unbiased) religious reason.

4.2 Distortion and Side-tracking of important policy issues

Does SPJ provide a solution to the problem that public reason norms may drive legislators to employ justificatory reasons that are bad or out of sync with the beliefs of their constituency? While this problem may not arise directly in the case of Beth's abortion bill, certainly the possibility of the problem emerging in other cases is present. One example can be found in some of the reasons used uphold oppose same-sex marriage bans. A common argument against same-sex marriage is that children with gay parents fare less well than children with heterosexual parents. Currently, a much cited social scientific study²⁸ used in political debates as well as in courts²⁹ to ground this claim, has been denounced by the American Sociological Association³⁰ as well as the researcher's (Mark Regnerus) own university.^{31 32} In fact established social scientific research suggests that same-sex parenting is not bad for children.³³ So why is the bad for children argument getting so much attention in political deliberation on same-sex marriage? Likely, because legislators are seeking to employ public reasons rather than

²⁸ http://www.markregnerus.com/uploads/4/0/6/5/4065759/regnerus_july_2012_ssr.pdf

²⁹ http://www.nytimes.com/2014/02/23/us/opponents-of-same-sex-marriage-take-bad-for-children-argument-to-court.html?_r=0

³⁰ http://www.asanet.org/documents/ASA/pdfs/12-144_307_Amicus_%20%28C_%20Gottlieb%29_ASA_Same-Sex_Marriage.pdf

³¹ <http://www.utexas.edu/cola/depts/sociology/news/7572>

³² In the study Mark Regnerus finds that children of gay parents are: more likely to be on welfare later in life, more likely to get arrested, more likely to suffer from depression, less likely to feel secure in their family of origin and less likely to do well on school tests than children with hetero-sexual parents (Regnerus 2012).

³³ http://www.nytimes.com/2014/02/23/us/opponents-of-same-sex-marriage-take-bad-for-children-argument-to-court.html?_r=0&module=ArrowsNav&contentCollection=U.S.&action=keypress®ion=FixedLeft&pctype=article

their unwelcome religious reasons to defend their policies. Are the legislators being insincere? That is certainly possible. But even if they are not being insincere, the likelihood of confirmation bias is certainly present.

Regnerus' research concerns questions such as: impact on childrens' cognitive abilities, emotional development, and likelihood of anxiety or depression. While the research has been debunked, people may take to it, because they are biased by beliefs about gay parents being morally corrupt in certain ways and thus unable to provide a suitable environment for children. It is very perceivable that many people believe that same-sex parents can only offer a morally corrupting environment for children. This would most likely not be a secular argument, since it would likely rely on beliefs that homosexuality is sinful. If you think that same-sex parents are inept at raising children, since they are already engaged in morally corrupt behavior, then you may well be more easily persuaded by research that says that these children really don't fare well. In a 2013 survey by Pew Research Center only one-in-ten cited non-religious reasons as to why they think that homosexuality should be discouraged by society. The opposition to gay-marriage is almost solely motivated by religious commitments. When religious legislators assess the social scientific research to see if secular reasons support their favored policies, they very likely will be either insincere or affected by confirmation bias and so the deliberation on the policy-issue gets side-tracked and comes to revolve around bad arguments.

4.3 Irrational consequences

When policy issues get side-tracked by bad 'public' reasons, this not only obfuscates the policy question, it could also may lead to irrational consequences. If same sex marriage bans are justified with the use of arguments like the 'bad for children' argument and such justificatory reasons become public knowledge, as they ideally should according to SPJ, we could for example imagine school teachers responding to these reasons by offering special support to children with (unmarried) same-sex parents. After all, teachers now have reason to believe that children with same-sex parents have special challenges. This would be an irrational consequence caused by a law justified by

unsound reasons.

4.4 Polarization

Does the weak version of SPJ hinder distrustful deliberation that may lead to polarization? We think not. Knowing that religious reasons may be lurking underneath the surface and being aware (as most are) of the general tendency of confirmation bias, fellow citizens who hold different views may very likely become distrustful of Beth's public reasons. Although Beth is sincere in the weak interpretation, they may well dismiss her credibility and thus become less likely to engage in the kind of reason-exchange that could expand mutual understanding and open up for consensus-building and a move towards exploring middle ground positions. After all, they have reason to be suspicious of bias. Clearly Beth is not involved in blatantly insincere political deliberation. Yet, in the same way that suspicion of disingenuousness may generate distrust, suspicion of bias may generate distrust.

Again if Beth were to employ her religious reasons, fellow citizens who disagree would have less reason to be distrustful and they would gather much more useful information about what matters most to Beth and her like-minded constituents. Perhaps they would also learn something from these views (Habermas 2006:10) and maybe even change their mind on the subject. Beth might herself learn something when her religious convictions become more open to scrutiny in public deliberation (Weinstock 2002: 260; Perry 2003:39). We are not here arguing for the option of giving free reign to religious reasons in politics, since we have provided no solution to the problem of religious imposition on the unwilling. We merely seek to show that sectarian religious reasons might fare better than weakly sincere public reasons in terms of upholding respect, trust and mutual understanding in political deliberation and more importantly, we show why weakly sincere public reasons do not do the job.

Concluding remarks

We have shown how insincere ‘public’ reasoning may cause disrespect, side-tracking and obfuscation of policy issues and lead to irrational outcomes and polarization. When policy questions become side-tracked and when disrespect and distrust leads to polarization, chances for consensus-building and mutual understanding between disagreeing parties dwindle.

We have argued that a strong interpretation of SPJ that requires that legislators are successful in bracketing religious convictions exceeds the cognitive and psychological capabilities of normally functioning human beings. The best we can hope for is that our legislators will abide by SPJ in its weaker interpretation which merely requires that legislators try to bracket religious convictions. But even so, we have shown that weakly sincere public reason may generate very similar problems as those associated with blatantly insincere ‘public’ reason: lack of due respect, polarization, side-tracking and distortion of policy issues and irrational consequences. The modest aim of this paper has been to illustrate some persistent obstacles that face theorists who want to overcome the sincerity impasse in the wide view of public reason (without engaging in major reconstruction of this public reason account) and to argue against settling for SPJ.

References

Audi, Robert. 2000. *Religious Commitment and Secular Reason*. Cambridge; New York: Cambridge University Press.

Audi, Robert and Wolterstorff, Nicholas. 1997. *Religion in the Public Square*. Rowman & Littlefield: Lanham, Md

Eberle, Christopher J.. 2002. *Religious Convictions in Liberal Politics*. New York: Cambridge University Press

Greenawalt, Kent, 1987. *Conflicts of Law and Morality*, Oxford: Clarendon Press.

Greenawalt, Kent. 1995. *Private Consciences and Public Reasons*. New York: Oxford University Press

- Laborde, Cecile. 2013. 'Justificatory Secularism' in *Religion in a Liberal State: Cross-Disciplinary Reflections*. (eds. D'Costa, Evans, Rivers & Modood). New York: Cambridge University Press
- Lafont, Cristina. 2007. Religion in the Public Sphere: Remarks on Habermas's Conception of Public Deliberation in Postsecular Societies, *Constellations* Volume 14, No 2, pp.239-259
- Habermas, Jürgen. 2006. Religion in the Public Sphere, *European Journal of Philosophy*, Vol 14, pp.1-25
- Klayman, Joshua. 1995. 'Varieties of Conformation Bias' in Busemeyer, R. Hastie, & D. L. Medin (Eds.) *Decision-making from a Cognitive Perspective*. New York: Academic Press
- Lafont, Cristina. 2009. Religion and the public sphere: What are the deliberative obligations of democratic citizenship? *Philosophy and Social Criticism*. 35 (1-2), pp. 127-150
- Perry, Michael. 2003. *Under God?*, Cambridge: Cambridge University Press
- Rawls, John 2005 . *Political Liberalism*, Expanded Edition. New York: Columbia University Press
- Reidy, D., 2000, "Rawls's Wide View of Public Reason: Not Wide Enough," *Res Publica*, 6(1), pp. 49–72
- Regnerus, Mark. 2012. How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study. *Social Science Research* 41, pp. 752-770
- Schwartzman, Micah. 2011. The Sincerity of Public Reason. *Journal of Political Philosophy*, Vol 19, Issue 4
- Stout, Jeffrey. 2005. *Democracy and Tradition*. Princeton, NJ, USA: Princeton University Press

Taber and Lodge. 2006. Motivated Skepticism in the Evaluation of Political Beliefs. *American Journal of Political Science* Volume 50, Issue 3, pp.755–769

Quong, Jonathan. 2011. *Liberalism without Perfection*. Oxford: Oxford University Press

Weinstock, Daniel. 2002. 'Citizenship and Pluralism' in Simon Robert L. (ed.) *The Blackwell Guide to Social and Political Philosophy*. Padstow: Blackwell Publishers, pp.239-267

Paul Weithman. 1991. 'The separation of church and state: some questions for Professor Audi' *Philosophy & Public Affairs*, 20, pp. 52–65

Scientific Facts and Methods in Public Reason

Karin Jønch-Clausen and Klemens Kappel, University of Copenhagen³⁴

Accepted for publication in *Res Publica*

What role should scientific rationality play in public justification? Roughly, public justification requires coercive laws and policies to be justified to reasonable citizens with reasons that they could (or do) endorse. If the justification for some of our basic laws and policies were based partly on reasoning and conclusions at odds with established science, would this give us a reason to question the legitimacy of these laws and policies? One may argue that beliefs or reasons that obviously conflict with established science simply fall outside the bounds of the reasonable and thereby are rightly excluded from the process of legitimization. Just like we don't have to be able to justify our laws and policies to Nazis, we don't have to be able to justify them to astrologists or creationists in so far as they deny central aspects of established science. However, one might turn the question on its head: Could privileging established science in law and policy-making be considered illegitimate in light of disagreement in the general public about scientific methods and findings? If the political theorist is committed to minimizing the idealization of citizens (by packing as little as necessary into the concept of reasonableness) and if groups of democratically minded citizens in a given polity hold unscientific beliefs, then she has at least a *prima facie* reason to include (or not exclude) these unscientific beliefs in the public justification framework.

³⁴ Acknowledgements: We appreciate the valuable input and commentary that the paper has received as it has been presented in its various stages. In particular we would like to thank Morten Ebbe Juel Nielsen, Martin Marchman Andersen, Sune Lægaard, Andreas Christiansen for criticism and helpful suggestions. We would like to thank Elizabeth Anderson for her valuable input as commentator at Scandinavian conference and PhD. course in normative political philosophy/theory (Nordic Network on Political Ethics--NNPE), Vejle, Denmark and José Luis Martí for his great input as commentator at EPISTO kick-off conference, ARENA centre for European studies, University of Oslo, Norway. Finally, we would like to thank the participants at the workshop of Epistemology of Inclusion, University of Copenhagen, Denmark and the discussion group on legitimacy and pluralism at University of Copenhagen.

The relationship between scientific rationality and public justification is complex and many questions that pertain to this relationship remain unresolved. We explore the relationship between scientific rationality and public justification in John Rawls's influential account on public reason. Although Rawls does not engage in a discussion about the role of scientific rationality in public reason, he does in his account suggest that public reason should be guided by common sense as well as "the methods and conclusions of science, when these are not controversial" (Rawls 2005:224). We will refer to this stricture as the *scientific standard stricture* (from here on SSS). In this paper, we offer what we consider the best interpretation of the stricture in order to pose the question: how can SSS be justified within the theory of public reason?

Our strategy is to stipulate potential answers to this question that might be derived from Rawls's general theoretical framework. We examine the following possibilities for the justification of SSS: (a) SSS facilitates the determinacy and completeness of public reason, (b) SSS must be accepted given a requirement of publicity, (c) abiding by SSS is part of what it means to be a reasonable person subscribing to reasonable worldviews, (d) there is no reasonable disagreement on the scientific standards harbored in SSS, (e) SSS is included in Rawls's notion of rationality and finally, (f) the scientific standards harbored in SSS may be justified in virtue of being implicit in the public culture of liberal democracy. We argue that none of these justification routes are successful. Rawls does not provide us with an adequate justification for excluding from public reason methods of inquiry and conclusions that are at odds with non-controversial science; nor does he provide us with the theoretical tools for a simple reconstruction that may produce such a justification. However plausible and attractive it may otherwise seem, SSS remains unsupported within Rawls's theory. The paper adds to a long list of criticism of Rawls' influential work on public reason. However, the questions we address are, at a more general level, relevant to a broader range of legitimacy accounts in contemporary political philosophy.

1. Public reason and the politically reasonable as a primarily moral notion

In order to pose our question about the justification of SSS, we will need to briefly rehearse central concepts in Rawls's account of public reason. As we hinted at in the introduction, when discussing the role of scientific rationality in public justification, a good place to start is with the idea of the reasonable. In this section, we will highlight central aspects of Rawls's understanding of reasonableness and how public reason arises from the idea of reasonable pluralism and reasonable disagreement.

Central to political liberalism is the idea of *reasonable pluralism*: the idea that a free society will comprise a plurality of reasonable, yet sometimes conflicting moral, religious and philosophical worldviews and a commitment to the *liberal principle of legitimacy*: very roughly, the idea the exercise of coercive political power is fully proper (or legitimate) only when exercised in accordance with principles that all reasonable and rational citizens can be reasonably expected to endorse.³⁵ Rawls took reasonable disagreements between different worldviews to be a permanent feature of liberal democracy and, in light of his commitment to liberal legitimacy, he held that no one comprehensive worldview should serve as the public justification of the basic institutions and political principles of a free society. Justification should be 'freestanding' in the sense of avoiding the presupposition of any one comprehensive worldview (Rawls 2005:10). Only by committing ourselves to freestanding justification of our basic political principles can we avoid illegitimate coercion of reasonable citizens. Rawls attributes the fact of reasonable pluralism to *the burdens of judgment*. The burdens of judgment state that the complexity in evaluating evidence, the difficulty in weighing political and moral values, the inherent vagueness of our concepts, and variations in life experiences will inevitably lead people reasoning under conditions of freedom to endorse a plurality of different but reasonable worldviews.

Because reasonable citizens acknowledge the burdens of judgment, they realize that there are limits to the kind of reasons for fundamental political principles that they can

³⁵ Rawls has articulated the principle in the following ways: "...our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason"(Rawls 2005: 137); "[Our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational." (Rawls 2005: 217)

expect fellow citizens to accept (as reasonable). In public reason citizens therefore refrain from appealing to the whole set of truths that they endorse, when they know that these purported truths are considered controversial from other reasonable points of view. According to Rawls, the burdens of judgment do not imply that reasonable citizens should resort to skepticism about their beliefs or comprehensive worldviews. Rawls is explicit about this (Rawls 2005: 62, 63). Rather, the burdens help us recognize what reasonable citizens with reasonable worldviews, wishing to engage in fair cooperation with others as equals, can require of each other when justifying and engaging with fundamental political questions.

Importantly, Rawls insists that we keep our account of reasonable worldviews “deliberately loose” (Rawls 2005:59) and that the criterion of reasonableness should be seen “as giving rather minimal conditions appropriate for the aims of political liberalism” (Rawls 2005: 60 fn.). It seems fair to interpret Rawls to mean that the burdens of judgment are to be understood, partially, as taking on a kind of ‘benefit of the doubt’ role. The burdens of judgment explain reasonable disagreement, but the bar for reasonableness is set low in order to accommodate the aims of political liberalism, including the aim of treating fellow citizens with respect as political equals.

The idea of *reasonable disagreement*, while comprising both epistemic and moral dimensions, is thus mainly a moral and not an epistemological idea (Rawls 2005: 62). It is therefore importantly different from ideas of reasonable disagreement found, for example, in social epistemology literature (Christensen 2007; Goldman 2010; Kelly 2005; Feldman 2006). Reasonable citizens do not have to assume some kind of epistemic parity amongst each other when assessing basic political principles. They do not have to consider the dissenting party as equally competent for the disagreement to be considered reasonable. Rather, they must find it reasonable, given the burdens of judgment, for the dissenting party to have reached a different conclusion and for *moral* reasons they give each other the benefit of the doubt when assessing whether fellow citizens disagree reasonably.

When relating this point about the burdens of judgment and reasonable disagreement to the idea of public reason, we see that in order to abide by the idea of public reason reasonable citizens may be willing to treat as sectarian (and thus omit) certain beliefs of

their own that they in the non-public realm would count as obviously true. They are willing to engage in such bracketing, because they recognize that in the public realm these beliefs are subject to reasonable disagreement.

It is important to note that the scope of public reason is limited in two ways: 1) it applies mainly to public officials and candidates for public office and only to ordinary citizens in certain circumstances³⁶ and 2) it applies when constitutional essentials and matters of basic structure are at stake. Constitutional essentials cover questions pertaining to fundamental rights and liberties. Matters of basic justice cover questions of basic economic and social justice. Rawls was open to the idea of public reason applying beyond constitutional essentials and matters of basic justice and several theorists have questioned the desirability and/or feasibility of drawing this distinction for the purpose of public reason (Quong 2011: 273–289, Greenawalt 1994, Habermas 2006:6 fn.) We do not take any position in this debate. Some may dispute that certain examples that we use for illustration are within the scope of Rawls’s public reason account. Some may for example argue that climate change is not a public reason question; others will say that since it ultimately involves questions of human rights and intergenerational justice, it is or should be within the scope. Since Rawls’s account on the role of science in public reason is underdeveloped, it is unclear where he would place such an issue. However, for the purpose of the discussion in this paper, we will assume that there are cases of disagreement about scientific facts that fall under the scope of public reason (or where the related policy questions do). These are the cases that we have in mind. We also assume that the cases we use for illustration can be used for this purpose, although it remains a further question whether they fall within the remit of public reason.

2. Interpreting the Scientific Standard Stricture (SSS)

³⁶ Primarily when voting on fundamental political questions. Whether or when it applies to ordinary citizens when they advocate laws or policies that relate to fundamental questions is unclear. On this question we agree with Cristina Lafont, when she argues that “If citizens may not use religious or otherwise comprehensive reasons in their own personal deliberations to determine how to vote, it would be quite inconsistent to claim that they may do otherwise when they engage in public deliberations with others as part of the same reasoning process.” (Lafont 2007:241). A favorable interpretation of Rawls’s position must broaden the scope of public reason as it applies to ordinary citizens beyond the voting booth. While very important for understanding Rawls’s account on public reason over-all, this discussion is not crucial to our particular discussion on science in public reason

We have seen how public reason emerges from the political liberal framework instantiating the politically reasonable as a primarily moral notion. In the following we will further characterize central features of public reason in order to locate SSS and provide what we consider the best interpretation of it.

The starting point of public reason is *reasonable political conceptions of justice* generated from fundamental ideas and values implicit in the political culture of a liberal democratic society. Reasonable political conceptions of justice specify, assign priority to, and facilitate the effective use of citizens' basic liberties and opportunities. Public reason thus emerges from a liberal democratic tradition and incorporates certain liberal ideas as cornerstones in the deliberative/justificatory framework. Furthermore, public reason specifies standards and criteria for free and public inquiry appropriate for the fundamental political questions which it seeks to settle and justify (Rawls 2005:223).

Rawls does not specify the content of shared standards of inquiry in detail. In *Political Liberalism* we are told that citizens "are to appeal only to beliefs that are generally accepted and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial" (Rawls 2005:224), i.e. SSS. But SSS is also familiar from Rawls's original position argument in *A Theory of Justice*. In the original position, representatives are modeled such that they abide by common sense reasoning and publicly recognized modes of inquiry and they are informed by the "existing scientific consensus" (Rawls 1999, [1971]: 480) and have "the general information provided by natural science and social theory" (Rawls 1999: 236). According to Rawls (in *A Theory of Justice*), this helps us secure that "...principles of justice, and their application to the basic structure of society [are] supported by rational procedures commonly recognized". SSS is thus not peculiar to the public reason account in *Political Liberalism*. Since our interest in this discussion is public reason, we will merely use Rawls's reflections on scientific standards with respect to the original position argument in *A Theory of Justice* to shed light on the limited information we are offered with regards to SSS in public reason. In so doing, we assume that the commitment to scientific standards that is asserted in the original position and SSS as it appears in public reason are supported by similar kinds of reasoning. We find this assumption reasonable because the original position device and the public reason

framework have very similar structures: namely, a structure in which agents reflect on principles and reasons from an impartial standpoint.

In order to determine what, more precisely, Rawls could have in mind with regards to non-controversial scientific methods and conclusions, we need first to get clear on how to understand “non-controversial”. The first question to ask is: controversial to whom? William Galston raises this question in his paper "Two Concepts of Liberalism" (Galston 1995:520):

[...] controversial to whom? For some religious groups, the theory of evolution remains contestable. For others, including established organizations such as the Christian Scientists, "spiritual healing" is equal (at least) to science-based modern medicine. If "not controversial" means "not challenged by any religion," then virtually nothing of contemporary science can be included in public reason. But if we construe "not controversial" to exclude the claims of dissenting religious groups, then once again, as with an overly restrictive definition of the reasonable, we fail to take deep diversity seriously.

We need to determine whether non-controversial refers to a consensus on the methods and conclusions of contemporary science in the general public or whether it refers more narrowly to an intra-scientific consensus or perhaps a mix. Note that we (like Rawls) focus on science that is currently policy-relevant. While this is an ever evolving category it is nonetheless a narrower category than science at large. We find in this category some significant disagreements and it is these disagreements that will be the focus of our attention.

When Rawls uses terms such as ‘existing scientific consensus’ (Rawls 1999, [1971]:480) and refers to “the general information provided by natural science and social theory” (Rawls 1999: 236) one probably should assume that Rawls has an intra-scientific consensus in mind. So, we can set aside as implausible the idea that Rawls takes SSS to refer to methods and findings that are publicly endorsed, but highly controversial or rejected in scientific communities. The question, then, is what apart from intra-scientific consensus is needed. One might suggest that no consensus in the extra-scientific public is needed. It seems to us, however, that such an interpretation would be in discord with central aspects of Rawls’s general theoretical framework. If

“non-controversial” is interpreted to refer only to an intra-scientific consensus³⁷, then beliefs or reasons supported by large parts of the general public could be excluded from public reason. This would happen, of course, in cases where the general public disagrees with what is widely accepted in established science. Laws or public policies based on intra-scientific consensus on policy-relevant factual questions would seem suspiciously non-public (in a certain sense) in cases where the general public rejects the intra-scientific consensus. One way of justifying a restriction to intra-scientific consensus would be to invoke a high degree of idealization on the part of citizens. Along these lines one might argue that the reasonable public must be idealized to such an extent that the reasonable public would not disagree with the scientists (when they themselves agree). We argue in section IV that Rawls cannot idealize the public to a very high degree without working against political liberal goals and therefore several such justification strategies are blocked. We hope that section IV makes clear that this narrow interpretation of SSS faces even deeper difficulties than the interpretation that we are going to suggest.

Perhaps “non-controversial methods and conclusions” should be interpreted to mean all and only the methods and conclusions that have gained unanimous support in the scientific communities *as well as* in the general public. Yet as Galston points out, if what is meant by non-controversial science is science that is disputed by no one, then not much science would be left. It is hard to come up with a range of policy-relevant scientific findings and methods that would not be contested by *some*, either in the public or in the scientific communities. The stricture in such an interpretation would exclude too much. Rawls sometimes uses the term “widely accepted” when referring broadly to shared epistemic standards and given the above considerations, and we find that this may be the best rendering of “non-controversial”. When a view is widely accepted in a community it is accepted by the vast majority of the members of this community, including most of the influential members, though not necessarily by all members of the community. So, we suggest that SSS requires that non-scientific methods and conclusions must be widely accepted³⁸ in the scientific as well as non-scientific

³⁷ For a defense of a version of the narrow interpretation see (Torcello 2011).

³⁸ From here on we will use the terms “widely accepted” and “non-controversial” interchangeably

communities in order to be part of public reason. Textual support for this interpretation is found in Rawls' writing by phrases such as the following:

As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice and their application to constitutional essentials and basic justice are to rest on plain truths now widely accepted³⁹ or available to citizens generally. Otherwise, the political conception would not provide a public basis of justification. (Rawls 2005: 225)

Here it is also pretty clear that “plain truths now widely accepted or available to citizens generally” could not refer to truths accepted by scientists, but highly controversial in the general public.

We have argued that the most plausible interpretation of SSS appeals to wide acceptance. This interpretation allows for *some* minority dispute in the scientific communities as well as in the general public.⁴⁰ In deliberating on gender equality it would, for example, be at odds with SSS to assume that men were unequipped to fulfill a range of roles in society due to inferior intelligence. The conclusion that there is a significant, over-all difference in intelligence between the sexes is at odds with non-controversial (widely accepted) science. The opposite conclusion, namely that that there is no significant difference in intelligence between the sexes, is widely accepted in the public and established scientific communities, despite the fact that you can find some laypersons and scientists who contest this conclusion. Note that in our actual, roughly speaking, liberal democracies SSS may come out differently on issues such as the controversies regarding anthropogenic climate change. In the United States there is a

³⁹ Here it is pretty clear that “plain truths now widely accepted” could not refer to truths accepted by scientists, but highly controversial in the general public

⁴⁰ For purposes of simplicity, we set aside the otherwise important question of whether or how numbers would matter in assessing the relevance of minority disputes for public reason

significant, long-standing disagreement⁴¹ about this issue in the general public. In many other of our actual liberal democracies, this is not the case.

3. Justifying the Scientific Standard Stricture (SSS)

Now that we have settled on the most plausible interpretation of SSS, we can turn to the question concerning the justification of SSS. We will start by asking whether SSS could be justified with reference to its purported role in enabling the determinacy and completeness of public reason (a).

(a) The determinacy and completeness of public reason. According to Rawls, public reason must be complete in the sense that it must be comprehensive enough to secure a reasoned and determinate justification for *most* fundamental political issues on the basis of public reasons alone. Shared standards and principles of inquiry (including SSS) help citizens interpret and order competing values, avoid “arguments that are too immediate or fragmentary” (Rawls 2005: 445), and to assess when and how principles of justice are satisfied and ultimately what these principles require of particular institutions (Rawls 1999: 429). To use a previous example, if we had to claim ignorance on the matter of whether there is a significant difference in intelligence between the sexes, then it would be difficult to interpret a commitment to gender equality and apply such an interpretation to an institutional framework.

But SSS cannot be justified by reference to its role in securing the determinacy and completeness of public reason *alone*. These considerations provide an explanation for how SSS makes public reason more *feasible*, but in a Rawlsian framework such pragmatic concerns fall short of addressing a much more pressing justification problem. We need to see how SSS may be justified in light of a commitment to the liberal principle of legitimacy. As we illustrated in section I, public reason indeed arises from this principle of legitimacy: the idea that political power is legitimate only when exercised in accordance with principles that all reasonable citizens could reasonably

⁴¹ Note that it could only be disagreements that are significant and long-standing in the general public that could render a scientific issue controversial in the context of public reason. The reason being that Rawls would not want public reason to be bound by sways in public opinion

endorse (Rawls 2005: 137). If the standards harbored in SSS were reasonably rejectable, then while admittedly contributing to the feasibility of public reason, they would still violate other, more foundational requirements deriving from the principle of legitimacy.

Rawls did not appear to think that SSS was in any way in tension with the liberal principle of legitimacy. Quite to the contrary, Rawls makes it explicit that common sense reasoning as well as the standards harbored in SSS are perhaps *the only* criteria that can accommodate the liberal principle of legitimacy. Referring to these criteria he writes that “the liberal principle of legitimacy makes this the most appropriate, if not the only, way to specify the guidelines of public inquiry. What other guidelines and criteria have we for this case?” (Rawls 2005:224)

In order to examine possible justification routes that would accord with the liberal principle of legitimacy, it needs to be shown that the standards comprised in SSS are standards that all reasonable and rational persons could accept (for the purpose of public reasoning). There are at least four possible justification routes that could point towards to such a conclusion. None of these, however, seem to withstand further scrutiny.

One justification strategy is based on the idea SSS must be accepted given a requirement of publicity (b). Another approach is to argue that abiding by scientific standards is constitutive of the reasonable person or reasonable worldviews (c). In a similar vein, one could hold that there simply is no reasonable disagreement on scientific standards (d) or that principles must be justified only to those who are reasonable *and* rational and SSS can be included in the rational (e) Finally, scientific standards may be justified in virtue of being implicit in the public culture of liberal democracy; the shared fundamental ideas that provide the fabric for developing reasonable political conceptions of justice⁴² (f). In what follows, we will go through

⁴² One may wonder why this strategy is included in the strategies that justify SSS in accordance with the liberal principle of legitimacy. The reason is that citizens who reject the ideas inherent in the public political culture of a liberal democratic society would fall outside the scope of reasonableness.

each of these justificatory strategies and attempt to show that, at closer examination, none of them are satisfactory.⁴³

(b) The publicity requirement. Let us start with the argument that SSS must be accepted given a requirement of publicity. It is clear that Rawls believed that SSS is critical to ensuring publicity. The purpose of providing a publicity requirement is to ensure that the reasons that ground fundamental political principles are known, understood and endorsable by implicated citizens such that their required proper consent is enabled.

Now there are at least two ways by which SSS and only these standards can be considered appropriately public. First, widely accepted scientific methods and findings are accessible or available to citizens generally i.e. they are not based on esoteric modes of reasoning. Call this the argument from accessibility. Second, non-controversial scientific methods and findings are non-sectarian meaning they do not rely on any given comprehensive worldview. Call this the argument from non-sectarianism. Let us consider these in turn.

The argument from accessibility. The idea is that widely accepted scientific facts and methods are accessible, in that the nature and contents of these facts and methods, and the reasons for holding the facts to be true and the methods reliable, can be assessed and understood by citizens generally. According to Rawls, “applying liberal principles has a certain simplicity” (Rawls 2005:162) Citizens must be able to come to know and accept the basic political principles and structure of their society and they must therefore be supportable by facts or modes of reasoning that are not highly speculative, tremendously elaborate or complex or based on private evidence such as religious experience. If the reasons grounding these basic political principles are inaccessible in these or similar ways to implicated citizens, then these principles cannot be considered legitimate. According to Rawls, non-controversial science is accessible in the right way and SSS is partly justified with reference to this feature.

⁴³ It should be noted that Rawls’s writings indicate that Rawls would justify SSS using a combination of some of the proposed justification routes. For purposes of simplicity, we treat them separately. It should also be noted that we do not see a combination of justification routes that would successfully justify the scientific standard criterion.

We find this assessment questionable. Maybe it can be said that non-controversial science is not highly speculative due to the broad intra-scientific consensus and wide public acceptance (although such a judgment is not entirely non-controversial). However, it seems difficult to grant that widely accepted scientific methods and conclusions are not based on reasoning that is tremendously elaborate or complex. We know, for example, that in many European countries, there is a broad consensus in the scientific communities and in general public on the fact that climate change attributable to human activities is taking place. We may therefore say that in these countries, this conclusion accords with SSS. However, few in the general public have the ability to assess the evidence for themselves. It is therefore fair to say that the evidence is indeed tremendously elaborate and complex in light of the competencies of the layperson or general public. This goes for many scientific findings.

Furthermore, it can be difficult to assess the nature and structure of a given scientific consensus and to determine whether there *is* a broad scientific consensus on a scientific conclusion⁴⁴. For example, it is not evident to everyone whether there is a scientific consensus on potential health risks associated with living close to wind turbines, if there are health risks regarding radiofrequency exposure from cell phones, on which religious slaughtering methods cause more or less animal suffering etc.⁴⁵

There is a tension here because widely accepted science does not provide the simplicity that Rawls is after. Firstly, widely accepted science may indeed be highly elaborate and complex. Secondly, it can be difficult to determine when something is indeed non-controversial since the intra-scientific consensus can be opaque. Rather than supplying a justification of SSS, further scrutiny of the accessibility of widely accepted science

⁴⁴ Elizabeth Anderson (2011) has made a contrary point that it is fairly easy for laypersons with access to the web to make second-order assessments about scientific consensus, she demonstrates this by showing how easy it is to acquire accessible information about the scientific consensus on anthropogenic global warming. So all the confused public has to do, is take the 5 minutes to visit Wikipedia. It seems, however, that global warming is a special case when it comes to readily available information on the internet. In the case of global warming the scientific consensus *itself* has been the subject of much public debate and media attention. Therefore we can expect *Wikipedia* to offer accessible information about the global warming controversy as well as the scientific consensus on the matter.

⁴⁵ These examples are just meant to illustrate that scientific consensus is not always evident to the public. We do not claim that these are public reason issues.

points to a tension in Rawls's writing on public standards and values: widely accepted science may not be accessible in the right way.

Here one may also note, that a wide range of non-scientific methods and conclusions that may conflict with non-controversial science could be considered accessible in the sense that they can be understood and assessed by citizens generally. Examples include religious methods of inquiry such as evidence based on the Bible or the Quran. There certainly are religious believers who hold that there is ample accessible, observable evidence to support their religious views.⁴⁶ Likewise, if you are interested in astrology, in most liberal democracies you should have an easy time finding courses to enroll in and as far as we are aware, the information that is taught and the methods that are used at these courses can be assessed by ordinary cognitively functioning individuals. We bracket here the question of whether these methods of inquiry are reasonable over-all. Our point is merely that if we focus on the *accessibility* of these methods of inquiry, it is not clear that they are inaccessible in a way that scientific methods of inquiry are not.

The argument from non-sectarianism. The second idea is that non-controversial science is public in that it does not imply a certain comprehensive worldview. Note here that scientism, the general idea that science alone can render truths about almost all aspect of human life, would obviously violate this constraint (and so scientism is not implied in SSS). Reasons that necessarily imply scientism are sectarian and fall outside the boundaries of public reason. According to Rawls, this does not hold for non-controversial science. It is, however, hard to see a clear cut distinction here. Many scientific facts and methods are widely accepted in certain polities and yet controversial from the point of view of certain minority groups, examples include conclusions about anthropogenic climate change, evolutionary biology, conclusions in the social science about such issues such as the lack of difference in the well-being of children raised by heterosexual or same-sex parents. We need further explanation as to why it is that

⁴⁶ This argument extends to the slightly modified version of the accessibility criterion in which we interpret the criterion to mean not actual accessibility, but accessibility *in principle*. This point has been made by Christopher Eberle (2002: 260): "Mystical perception is thoroughly democratic in the relevant sense: just as any citizen enjoys cognitive capacities he could have employed to understand and evaluate scientific theories that bear on specific coercive laws, even though he cannot in fact, any citizen can perceive God in that he enjoys the cognitive faculties that he can employ to perceive God even though he does not in fact."

widely accepted scientific facts and methods are not to be considered sectarian, when minorities find them deeply controversial. Again one suspects that the answer has to do with the notion of reasonableness. So let us turn to the justification routes that tie SSS to this notion.

(c) SSS as constitutive of the reasonable person or reasonable worldviews. First, we should examine the possibility that abiding by SSS is constitutive of the reasonable person. To explore this approach, think of the example in which two supporters of liberal democracy disagree on a widely accepted scientific fact or method relevant to a fundamental political question. Maybe it could be argued that the party on the wrong side of the controversy (the non-scientific side), ceases to be reasonable once she exhibits epistemic commitments that are irreconcilable with parts of non-controversial science. The disagreement thus ceases to be reasonable since it is no longer a disagreement between reasonable persons. The party on the scientific side of the disagreement is thus in her right to use scientific standards in justifying her point of view in public reason, since there is no coercion of *reasonable* fellow citizens involved in such an activity. So, the suggestion would be that reasonable citizens simply cannot disagree on scientific standards, because abiding by them is part of what it means to be reasonable in the first place. In order to assess this approach we need first to review the idea of the reasonable person as it is employed by Rawls.

According to Rawls, a reasonable person is willing to propose and abide by principles of fair terms of cooperation, given the assurance that others will likewise do so. She is able to exercise her two moral powers: a capacity for a sense of justice (the capacity and willingness to abide by fair terms of cooperation) and a capacity for a conception of the good (the capacity to form, to revise and to rationally pursue a conception of one's rational advantage or good) (Rawls 2005:19). As a necessary requisite for exercising her moral powers, she has the intellectual powers of judgment, thought and inference.⁴⁷ The reasonable person recognizes the burdens of judgment and she harbors a commitment to mutual respect of her fellow citizens and to an idea of reciprocal justification: the idea

⁴⁷ Rawls holds that citizens cannot be reasonable if they are not also rational. According to Rawls "neither can stand without the other" (Rawls 2005: 52). We examine Rawls notion of rationality separately in (e)

that basic political principles and fair terms of cooperation should be endorsable by all implicated reasonable citizens (Rawls 2005:50). She recognizes the basics of a conception of political objectivity, which put very roughly means that she has the ability and willingness to reason from an impartial perspective. Finally, the reasonable person will adhere to a reasonable comprehensive doctrine.

Rawls defines a reasonable comprehensive doctrine as "an exercise of theoretical reason [which] covers the major philosophical, religious, and moral aspects of human life in a more or less consistent and coherent manner" (Rawls 2005:59), an exercise of practical reason by its ability to prioritize values significant to a given case, a doctrine that is stable yet able to revise itself in light of relevant reasons and evidence, a doctrine that can be affirmed in a reasonable way (Rawls 2005:60) and that can support a democratic society (Rawls 2005:83). It is obvious from this brief characterization of reasonable doctrines that it does not invoke or motivate the epistemic constraints harbored in SSS.

It seems that the only trait of the reasonable person to which one could attempt to tie a commitment to SSS, would be the trait that specifies the willingness and ability to reason from an impartial standpoint; or in Rawls's terms, the reasonable person's recognition of a basic conception of political objectivity. The argument would be that a recognition of a basic conception of objectivity is inherently connected with an acceptance to abide by SSS. According to Rawls, an essential feature of the basic conception of objectivity is that it establishes "a public framework of thought sufficient for the concept of judgment to apply and for conclusions to be reached on the basis of reasons and evidence after discussion and due reflection"(Rawls 2005:110). This requires that we can reason from mutually recognized criteria and evidence. The conceptions of objectivity specifies an order of reasons that (in the required circumstances) will guide citizens whether or not they conform with their own point of view and similarly, distinguishes an objective point of view from any particular point of view and gives an account of agreement in judgment among reasonable agents (Rawls 2005: 111-112). The original position is an instantiation of Rawls's account of objectivity. It establishes an impartial standpoint and shared perspective from which we can imagine reasonable citizens making objective judgments about justice. Public reason tracks this ideal of objectivity in political judgment.

Does a proper recognition of political objectivity imply a commitment to abide by SSS? It seems that Rawls does indeed believe that this is the case, as he seems to believe that scientific standards harbored in SSS are the only epistemic standards that are appropriately accessible and non-sectarian, and therefore they are the only standards suitable for impartial reasoning based on mutually recognized evidence and criteria. But in assessing the argument from publicity, we have already shown that it is by no means clear that widely accepted science exhibits these key features in a way that competing epistemic standards that are excluded by SSS do not. An argument from objectivity does not provide this discussion with any new insights. Like the similar argument from publicity, it therefore appears to an unviable justification strategy.

Furthermore, we have to remember here that reasonableness is largely a moral notion and reasonableness as it applies to persons is likewise largely, almost solely, a moral quality. The crucial characteristic of the reasonable person is her commitment to engage with fellow citizens in fair terms of cooperation and her insights on what she owes her fellow citizen in terms of mutual respect. It is these moral qualities that explain her commitment to impartial reasoning and reciprocal justification in the public realm. Epistemic qualities play a very little part in the make-up of the reasonable person and they mainly function as enablers of moral qualities.

(d) There is no reasonable disagreement on non-controversial science. An alternative justification strategy is simply to hold that there is no reasonable disagreement on non-controversial science. As previously mentioned, ‘reasonable disagreement’ as understood by Rawls are those disagreements that persist due to the burdens of judgment. Could it be argued that widely accepted scientific findings and methods are no longer subject to the burdens of judgment? The idea behind such a justification strategy would be to argue that widely accepted science relies on evidence that is no longer considered conflicting and complex, on concepts that are no longer considered vague, on an area of inquiry in which we should be expected to roughly agree on relevant considerations and the weight we grant these consideration etc. We are now supposing that the burdens of judgment apply not only to disagreement about value or moral questions, but also disagreement about fact and method.

This justification route faces a least two problems. One problem is that the fact that a method or conclusion is widely accepted in the general public does not necessarily mean that it is based on evidence that is no longer considered conflicting and complex etc. Vice versa controversies in the general public are not necessarily indicators of the complexity, nebulousness etc. of question at stake. Such controversies can have many causes

If ‘controversial’ referred to intra-scientific controversies only, this kind justification route might seem more plausible. But even in scientific communities a broad consensus can at times come about to due factors other than those harbored in the burdens of judgment: political influence, prejudice, systemic bias or unwarranted orthodoxy, influence of industrial partners etc. In circumstances when such factors play a decisive role, it can be entirely reasonable for experts to disagree with a broad intra-scientific consensus.

More importantly, this justification approach faces some of the same problems as those that arose in b). The bar for reasonableness is set higher than Rawls where Rawls should be willing to set it. Recall that recognizing the burdens of judgment is only partially an epistemic exercise. Citizens are not asked to consider each other epistemic peers. They offer each other the benefit of the doubt and include as reasonable certain judgments that according to their own comprehensive views would not be considered reasonable. The idea that that non-controversial science is beyond reasonable disagreement conflicts with this understanding of the burdens of judgment.

(e) SSS is implied by Rawls’s idea of the rational. Perhaps if SSS cannot be tied to reasonableness, it can be justified with reference to the rational? After all, the public reason constituency is not just reasonable, it is also rational. The rational is often somewhat overlooked in discussions on public reason. As we saw in section II, public reason for Rawls is built on the idea reasonable citizens who reasonably disagree. But the liberal principle of legitimacy concerns reasonable and rational citizens (Rawls 2005:217), two notions that according to Rawls are complementary and interdependent.

Rawls’s notion of rationality includes more than means-ends reasoning and the ability to pursue goals of one’s own coherently, it also includes certain criteria for proper

reasoning. Public reason cannot make do without this latter element of rationality: we need to know when a reason is indeed a reason and we must be able to decipher reasons from rhetoric and means of persuasion. In Rawls's own words "...all ways of reasoning [...] must acknowledge certain common elements: the concept of judgment, principles of inference, and rules of evidence, and much else..." (Rawls 2005: 220). We have already seen that Rawls insists on shared methods of inquiry, but he clearly is not defending a highly relativistic approach to justification. Public reason must be in accordance with methods of reasoning that are both shared *and* rational. Maybe we could say that being rational also entails reasoning in accordance with widely accepted scientific facts and methods?

This strategy must be rejected firstly because it restricts the diversity of citizens beyond what political liberalism should allow. Observe for example that under this rationality standard, creationists who disagree with a scientific consensus on evolutionary biology may find their reasons excluded not only because their reasons are deemed sectarian or inaccessible, but also because they are deemed irrational. Firstly, it is unclear from which vantage point such judgment could be made and secondly, restricting diversity of factual/empirical views in this way may be inconsistent with Rawls's insistence on broad diversity in the moral realm, since moral beliefs and factual/empirical beliefs about what the world is often are interrelated and interdependent.

Moreover, the boundaries for determining which science is in and which is out also become suspiciously ad hoc. If we can add a scientific mindset to the public reason constituency without a burdens of judgment or publicity story, then why set the limit at widely accepted science, why not higher or lower?

(f) SSS is implicit in public culture. The final strategy for justifying SSS could be to show that the scientific standards comprised in the stricture are implicitly endorsed in the public political culture of democratic society. We have seen that political conceptions of justice that provide the content of public reason are "expressed in terms of certain fundamental ideas seen as implicit in the public culture of a democratic society [...and...] This public culture comprises the political institutions of a constitutional regime and the public traditions of their interpretation (including those judiciary), as well as historic texts and documents that are common knowledge" (Rawls

2005:13-14). When developing conceptions of justice, we do not start with a blank slate. We draw from a shared fund of recognized basic ideas and principles implicit in the public culture of democratic society (Rawls 2005:8) and let such ideas provide the framework for conceptions of justice. Citizens who reject the liberal democratic project wholesale, including these familiar ideas and principles, fall outside the scope of the political liberal project. Rawls's liberal project thus starts *within* a liberal democratic tradition and uses ideas implicit in liberal democratic culture as fabric in developing political conceptions of justice. Public reason is thus already furnished with ideas that are currently seen to be inherent to liberal democratic culture.

Could methods and conclusions of non-controversial science belong to the class of ideas that are commonly recognized as being implicit on liberal democratic culture? Rawls clearly holds this to be the case. He explicitly writes that we are to “keep in mind that we aim to find a conception of justice for a democratic society under modern conditions; so we may properly assume that the methods and conclusions of science play an influential role.” (Rawls 1999: 324) And it does indeed seem to hold true that scientific methods and conclusions play an influential role in many societies that we could today broadly call liberal democratic societies. But in order to add scientific standards to our shared fund of ideas, we need to know that they are more than merely *prominent* in most liberal democracies, we need to know that they are an *essential component* of modern liberal democratic culture. We see this when we assess the reason for including ideas that are implicit in modern democratic culture. One of the main aims of political liberalism is to develop the most feasible and appropriate conceptions of justice that realize core liberal democratic values. Rawls enables this aim by allowing input from the public culture of democratic society. These ideas provide direction and a framework to operate within when deliberating on conceptions of justice. Now we find, for example, in the public culture of modern liberal democracy an idea of religious toleration. This idea is in many ways inseparable from the liberal democratic culture, it is an inherent and by no means accidental feature of this culture. We cannot secure democratic liberty and equality if we also oppose religious toleration. A political conception of religious toleration is thus part of the fabric that must be included and interpreted in any reasonable conception of justice. Political liberalism does not address itself to those who reject this value wholesale because they cannot earnestly take part in

the project of developing conceptions of justice that account for core liberal democratic values and apply these conceptions to laws and institutions. The same does not appear to go for those who reject certain scientific methods and conclusions that are otherwise widely accepted. It would seem strange to argue that including reasons that are at odds with widely accepted scientific facts and methods would be inconsistent with the basic tenets of the liberal democratic enterprise. A commitment to basic liberal democratic values and principles neither includes nor excludes scientific facts or methods.⁴⁸

Concluding remarks

We have posed the question of whether SSS could be internally justified in Rawls's public reason account and thus explain how the exclusion of views that are at odds with non-controversial science in public reason could be warranted. In answering this question, we provided what we take to be the most plausible interpretation of SSS and explored several justificatory strategies that Rawls could follow to justify the special role of non-controversial science in public reason. However, none of the strategies seemed to lead to a satisfactory justification. While SSS seems reasonable on the face of it, further scrutiny shows that it is not properly justified by the other components in Rawls's framework. Importantly, it has not been our aim to argue that science should not be privileged in public reason, indeed we think that it should. Our more modest aim has been to illustrate the difficulties involved in justifying such privileging. Providing a justification of the privileged role of science in public reason must await future work.

References

Anderson, Elizabeth. 2011. Democracy, Public Policy, and Lay Assessments of Scientific Testimony. *Episteme*: Vol.8, issue 2

⁴⁸ Of course many pragmatists have argued that certain types of scientific inquiry are indeed inherent to liberal democracy. Usually 'scientific inquiry' in this context refers to basic experimental or responsive modes of inquiry. We do not know of any pragmatists who argue that scientific methods and facts need to be currently widely accepted in order to count as inherent to democracy. In a different paper, we argue that a recent attempt by Robert Talisse (Talisse: 2009) to show that we are all committed to a certain basic type of (broadly speaking) scientific inquiry and that this commitment gives us all a reason to endorse liberal democracy is unsuccessful (Jønch-Clausen & Kappel 2015).

- Christensen, David. 2007. Epistemology of Disagreement: The Good News, *Philosophical Review*: 116(2), pp118-217
- Eberle, Christopher J. 2002. *Religious Convictions in Liberal Politics*. New York: Cambridge University Press
- Feldman, Richard. 2006. 'Epistemological puzzles about disagreement'. In *Epistemology Futures*. Ed. S. Hetherington, Oxford: Clarendon Press, pp 216-236
- Habermas, Jürgen. 2006. Religion in the Public Sphere," *European Journal of Philosophy*, Vol 14 no.1, pp.1-25
- Galston, William. 1995. Two Concepts of Liberalism. *Ethics*: Vol. 105, No. 3, pp. 516-34
- Goldman, Alvin. 2010. Epistemic Relativism and Reasonable Disagreement. In *Disagreement*, (Eds. Richard Feldman and Ted A. Warfield). New York: Oxford University Press
- Greenawalt, Kent. 1994. On Public Reason. *Chicago-Kent Law Review*: Vol. 69: Iss. 3, Article 5, pp.669-689
- Jønch-Clausen, Karin & Kappel, Klemens. 2015. *Ethical Theory and Moral Practice*, Volume 18, Issue 2, Page 371-384
- Kelly, Thomas. 2005. 'The Epistemic Significance of Disagreement'. In *Oxford Studies in Epistemology*, vol. 1. (Eds. T. Gendler and J.Hawthorne). Oxford: Oxford University Press
- Lafont, Cristina. 2007. Religion in the Public Sphere: Remarks on Habermas's Conception of Public Deliberation in Postsecular Societies, *Constellations* Volume 14, No 2, pp.239-259
- Rawls, John. 1999. *Collected Papers*. Cambridge, MA: Harvard University Press
- Rawls, John .1999. *A Theory of Justice*. MA: Havard University Press
- Rawls, John. 2005. *Political Liberalism*, Expanded Edition. New York: Columbia University Press

Talisie, Robert. 2009. *Democracy and moral conflict*. Cambridge: Cambridge University Press

Torcello Lawrence. 2011. The Ethics of Inquiry, Scientific Belief, and Public Discourse. *Public Affairs Quarterly*, Vol. 25, No. 3 pp. 197-215.

Quong, Jonathan. 2011. *Liberalism without Perfection*. Oxford: Oxford University Press

Factual claims in religious exemption cases: limiting the “hands-off religion” approach

Karin Jønch-Clausen, University of Copenhagen⁴⁹

The general principle that the judiciary should not get involved in resolving religious disputes or assessing the merit of religious beliefs and practices is broadly accepted in US courts⁵⁰ However, while this general principle (often referred to as the “hands-off approach” or the “religious question doctrine”) is broadly accepted, the principle’s boundaries and justification is not always entirely clear (Garnett 2009; Greenawalt 1998; Laycock 2011). In this paper, I examine the hands-off approach as it applies in religious exemption cases. In religious exemption cases, the religious claims put forth by the objector are generally treated as hands-off in terms of merit judgment, i.e. courts must assess merely the sincerity of the claim and not the claim’s reasonableness, soundness, consistency etc.

The hands-off approach is based primarily on neutrality concerns: the idea that the state cannot engage in resolving religious questions while remaining neutral between religions and between religion and non-religion. There are many ways by which the hands-off approach is, could or should be limited. The very modest aim in this paper, is to propose one limit for the hands-off approach (acknowledging that other limits are and should be drawn). I want to make the (seemingly) simple argument that the hands-off approach should apply to factual beliefs/reasons only insofar as these factual beliefs are based on religious evidence. I argue that this limitation should apply to the over-all

⁴⁹ I want to thank Klemens Kappel and Sune Lægaard for very helpful criticism on this paper. Also I want to thank Alta Charo for some very inspiring discussions and valuable recommendations. I also want to thank Ann Althouse for her helpful suggestions.

⁵⁰ *United States v. Ballard*, 322 U.S. 78 (1944). (“The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.”); *Watson v. Jones*, 80 U.S. 679 (1872). (“...[civil courts] may not take cognizance of purely spiritual or ecclesiastical questions, as such; just as they may not take cognizance of any moral or scientific questions for the purpose of determining upon their abstract truth”); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969); *Serbian Orthodox Diocese v. Milivojevic*, 426 U.S. 696 (1976)

exemption claim as well as its various parts. While this limitation may appear obvious to some, enough perplexity seems to be present in courts, news and academic commentary to warrant a discussion of this limitation. The practice of evaluating a religious objector's over-all claim in terms of sincerity and religious nature is well established. However, perplexity seems to emerge when assessing the various reasons/beliefs that constitute a religious exemption claim. Focusing on factual claims, I argue that a simple rule of evidence should always be followed: the hands-off approach applies to non-normative factual claims/reasons when, and only when, these claims draw on religious evidence. The rule acknowledges that religious claims need not be normative in nature, they can also be factual. However, it insists on shielding from judicial evaluation only those claims that are indeed religious. Religious evidence could, for example, be appeal to scripture, tradition, religious authorities and comprehensive philosophical views on human existence. Religious evidence must (like the idea of religion in general) remain broadly construed and flexible in the courts. I will return to the problem of identifying religious evidence and the rationale behind a broad and flexible understanding of religion in section 4.

The simple rule of evidence is to apply all-the-way-down. By all-the-way down, I mean that courts should examine all the various reasons constituting a religious exemption claim and determine whether unreasonable or erroneous factual claims based on non-religious evidence play a role in the objector's assessment of the burden caused by the law in question. An objector's claim may be overall religious in nature, yet harbor certain claims that are not based on religious evidence. According to the all-the-way-down religious evidence rule, these subparts would not be hands-off in terms of merit judgment. I will use a thorough analysis of the recent *Burwell v. Hobby Lobby* Supreme Court case to illustrate the purpose of the all-the-way down religious evidence rule. In *Hobby Lobby* the plaintiffs acquired a religious exemption from Affordable Care Act's contraceptive mandate by employing claims about contraceptives that many commentators deemed erroneous or unscientific.

Before I begin my discussion of the *Hobby Lobby* case I will, in section 1, situate the case by briefly reviewing the history of the Religious Freedom Restoration Act, the federal statute under which the religious objectors in *Hobby Lobby* filed their suit. This

history gives a picture of the ever-changing landscape of religious liberty protection in the judiciary. In section 2, I review two controversial factual claims about contraceptives put forth by the plaintiffs in *Hobby Lobby* and I will show how the religious evidence rule applies to these claims. In section 3, I go on to show how the religious evidence rule applies in another contraception case: *Priests for Life v. Department of Health and Human Services*. In *Priests for Life*, the Justices and lawyers debated the question of whether the plaintiffs in the case could rely on factually erroneous claims. In section 4, I outline the rationale for the hands-off approach and I argue, on the basis of the reviewed cases, that the religious evidence rule must be part of any reasonable interpretation of the approach. In section 5, I discuss the problems involved in identifying religious evidence and I argue that while identifying religious evidence in the various parts of objectors' claims may be at times difficult and controversial, neglecting to make the distinction between religiously grounded factual claims and non-religious factual claims is not a viable alternative. The dilemma that occurs is an old one: drawing the boundaries of religious evidence too narrowly will hurt religious liberty, drawing the boundaries too broadly may result in an anarchic exemption regime. I argue that the religious evidence rule strikes a reasonable balance between these concerns.

The scope of the paper is limited in several ways. Since I am not a legal scholar, my focus will be on deciphering reasons for delineating the boundaries of the hands-off approach and not so much on precedent. It is not the purpose of the paper to argue that the cases I employ should have been decided differently than they were. I use *Hobby Lobby* and other recent court cases to illustrate how the hands-off approach works and to discuss how it should work. In so doing, I will go through hypothetical scenarios involving the factual claims at stake and I will abstract from details of the cases that are not relevant to that particular discussion. The *Hobby Lobby* decision was controversial in several respects, most notably for extending freedom of religion protection under RFRA to “closely held”⁵¹ corporations. I set these issues aside. I also set aside bigger

⁵¹ The Court did not define ‘closely corporation’ and the definition thus became a point of contention after the ruling. The Internal Revenue Service defines a closely held corporation as being more than 50 percent owned by five or fewer individuals in the last half of a tax year, and not a personal service corporation. <http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently->

questions concerning the justification for religious exemptions. For the purpose of the paper, I simply assume that some religious exemption regime is desirable insofar as it is regulated by appropriate rules and boundaries. My contribution in this paper is to point to one of these boundaries.

1. The Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA) states that:

(a) IN GENERAL.-Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.-Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest⁵²

RFRA was implemented in 1993 by the Clinton administration with major bipartisan support in both chambers of Congress. The statute was a response to the 1990 Supreme Court case *Employment Division v. Smith*. In *Employment Division v. Smith* the Supreme Court ruled that “the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”⁵³

Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5.

⁵² The Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb

⁵³ 494 U.S. 872 (1990). The plaintiffs in the *Smith* case were Alfred Smith and Galen Black, members of the Native American Church. Smith and Black had been fired for ingesting peyote as part of a ceremony at the Native American Church. The ingestion of peyote caused them to be fired from the jobs as counselors at a private drug rehabilitation clinic. At the time, Oregon law prohibited the use of controlled substance. The Oregon Supreme Court (on remand from

The *Smith* decision broke suddenly and surprisingly with the accommodation model that had been employed in free exercise jurisprudence for decades. Since the 1963 Supreme Court case *Sherbert v. Verner*⁵⁴ an accommodation model was employed under which religious objectors could acquire exemptions from generally applicable laws if the laws imposed a substantial burden on the objector's religion *unless* the government could demonstrate that such burden could be justified with reference to a compelling state interest. In *Smith* the Court employed a much narrower interpretation of the First Amendment's free exercise clause: a reinterpretation that neither party in the *Smith* case had asked for (Laycock 2011). In the *Smith* interpretation, laws could burden religious practices so long as the law was 'neutral and generally applicable' in the sense that it did not target or purposely discriminate against any religion. Burdens on religion that were unintended or incidental could no longer ground exemption claims or no longer required any special justification. This reinterpretation was a major hit to religious liberty and to minority religions in particular, since minority religions more easily are subject to 'incidental' burdens. The majority in *Smith* acknowledged these problems, but determined that this limitation of religious freedom was necessary in order to avoid an anarchic exemption regime.⁵⁵

RFRA was a response to the widely unpopular reinterpretation of the free exercise clause in *Smith*. The purpose of RFRA was to restore at least some of the pre-smith accommodation model and the compelling interest test set forth in *Shebert v. Verner*. In 1997 *City of Boerne v. Flores* the Supreme Court ruled that in implementing RFRA

the US Supreme Court) found that peyote did indeed fall within the prohibition of the Oregon law. The Oregon Supreme Court ruled that the prohibition of peyote was invalid under the free exercise clause. The US Supreme Court reversed this decision applying its much narrower reinterpretation of the free exercise clause.

⁵⁴ 374 US. 398 (1963)

⁵⁵ The Court wrote in the majority decision: It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs

“Congress exceeded the scope of its enforcement power”⁵⁶ under the Fourteenth Amendment⁵⁷ and RFRA was thus struck down as unconstitutional when applied to the states. RFRA as applied to federal government remained intact and many states eventually implemented their own versions of RFRA.

The discussion on whether religious exemptions should be understood as constitutional rights or should be applied as a matter of legislative grace , i.e. something that is granted at the legislatures discretion (Greenawalt 2008:298) has been ongoing since the earliest days of American history (McConnell: 2000-2001). In today’s post-*Smith* era in which the federal government and many states have adopted RFRA’s, the religious exemption practice lies somewhere in between the the *Shebert* era accommodation model and the constitutional exemption model.⁵⁸

The *Hobby Lobby* case was filed against Affordable Care Act’s contraceptive mandate, a federal law. RFRA therefore applied.

2. Hands-off in *Burwell v. Hobby Lobby*

In the wake of the Supreme Court ruling in *Burwell v. Hobby Lobby* prominent news media (including The New York Times, Los Angeles Times, Forbes, New Republic⁵⁹) were reporting that the Supreme Court had accepted flawed science as a basis for providing religious exemptions from Affordable Care Act’s contraceptive mandate.

⁵⁶ 521 US 507 (1997)

⁵⁷ In particular section five which states that: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

⁵⁸ Even when state have adopted RFRA’s, the protection of religious liberty is more vulnerable than under the *Shebert* era, since state legislatures have the power (when the political will is present)to change their statutes (Volokh 1999)

⁵⁹ http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html?_r=0&abt=0002&abg=1

<http://www.latimes.com/local/abcarian/la-me-ra-craziest-thing-about-hobby-lobby-20140630-column.html>

<http://www.newrepublic.com/article/118547/facts-about-birth-control-and-hobby-lobby-ob-gyn>;
<http://www.forbes.com/sites/davidkroll/2014/06/30/will-the-supreme-courts-contraceptive-decision-affect-coverage-of-other-drugs/>

The case against the US Department of Health and Human Services (HHS) was brought by two Christian families, the Greens and Hahns, and their businesses, Hobby Lobby and Conestoga Wood Specialties. The Greens and Hahn's (from here on the plaintiffs) claimed that four contraceptives included in the contraceptive mandate can work after fertilization. According to the plaintiffs' faith, life is inviolable and begins at conception and any contraceptive that works beyond fertilization is considered an abortifacient, the use of which is a grave sin. The plaintiffs claimed that four contraceptives included in the contraceptive mandate could work as abortifacients and including these contraceptives in their employees' insurance plans would make the plaintiffs complicit in sin. The plaintiffs won the case. The Supreme Court held that 'closely held' for-profit corporations like Hobby Lobby and Conestoga Wood Specialties fall under the definition of 'person' under RFRA. The Court further held that the contraceptive mandate placed a substantial burden on the plaintiff's religious exercise and finally, that the government had not used the least restrictive means to further their compelling interest. The compelling interest being that of ensuring that employees received cost-free, FDA approved contraceptives. I will focus only on the aspect of the case that concerns the substantial burden on the plaintiffs and the question of how the hands-off approach should apply to the factual claims about contraceptives put forth by the plaintiffs in the case.

2.1 The science question in *Hobby Lobby*

It is important to decipher between two different science issues harbored in the *Hobby Lobby* case. The first issue had to do with the way the plaintiffs defined 'abortifacient'. According to the plaintiffs pregnancy starts at conception and an abortifacient is a drug that works to end pregnancy beyond that point (for example by inhibiting implantation). By contrast, according to medical scientific definitions and federal policy, a woman is considered pregnant only when a fertilized egg has implanted in the wall of her uterus which normally happens a few days after fertilization, and an abortifacient is a drug that works to end pregnancy beyond that point.

A second issue had to do with how the contraceptives in question actually work. The question here is: can the four contraceptives in question (two types of intrauterine

devices: copper IUD and Mirena and two types of emergency contraceptives: Plan B and Ella) act as an abortifacient as that term is defined by the plaintiffs? According to the plaintiffs, the drugs can work to terminate pregnancy thus defined. According to current science, Ella, Mirena and Plan B do not work to terminate a pregnancy as defined by the plaintiffs. The copper IUD could potentially work to prevent implantation, but only when used as emergency contraception. Due to the difficulty of conducting experiments that show exactly when contraception works, there is a small level of uncertainty regarding this otherwise broadly agreed upon conclusion in medical science.

2.2 Applying the religious evidence rule to claims made about contraceptives

In commentary on the *Hobby Lobby* case, these two science issues were not always clearly separated. However, if we apply the religious evidence rule it should be clear why these issues should be separated. Recall the religious evidence rule says that the hands-off approach applies to (non-normative) factual claims/reasons *only when* these claims draw on religious evidence and it applies all-the-way-down i.e. to all the various parts that constitute the exemption claim. Now the plaintiffs in *Hobby Lobby* clearly have a serious moral concern *grounded in religion* with destroying a fertilized embryo. Even if the plaintiffs were to refrain from using the term ‘abortifacient’, which they use differently than medical establishment (and federal law), their commitment to protecting the fertilized embryo remains. Scientists and the plaintiffs appeal to very different kinds of evidence with different purposes⁶⁰ when deciding how to define pregnancy and abortifacient. The plaintiffs draw on religious evidence about the beginning of God-given, inviolable human life. In the majority opinion, Alito made reference to Constega Woods’ board-adopted “Statement on the Sanctity of Human Life,” which states that being involved in terminating life beyond the point of conception is “a sin against God

⁶⁰ Indeed the fact that human life begins at conception is established in both the medical and religious communities. However, in the medical community this fact is simply not decisive to the question of how to define pregnancy. The disagreement is thus terminological rather than factual. Scientists find it useful for their purposes to draw the line at implantation, certain religious people find it morally imperative to draw the line at conception.

to which they are held accountable.”⁶¹ While it is not explicit whether such beliefs are drawn from scripture, religious authorities or tradition, it is clear that they draw on one or more of these types of sources. This kind of religious evidence is irrelevant to scientists just like the medical definition of pregnancy is irrelevant to the plaintiffs who are seeking to live by the word of God and who thus must define when the use of contraceptives are in violation with God’s commands.

The second issue concerns how the four contraceptives actually work. With regard to this question, scientists and plaintiffs are not talking past each other, so to speak. Medical experts and the plaintiffs do not have substantial disagreements about what kind of evidence would settle the matter of how contraceptives work: the evidence would be of a scientific nature and religious evidence would not play a part in settling this question.

According to the rule of religious evidence, the question concerning the definition of pregnancy and abortifacient is off-limits in terms of merit judgment. The plaintiffs are relying on religious evidence and their claim therefore need not be in accordance with science. The second claim about the workings of contraceptives is open to scrutiny, since it does not (or at least does not appear to) draw on religious evidence.

In *Hobby Lobby* the religious evidence rule appeared to be by and large followed. The issue concerning definition of pregnancy and abortifacient was not questioned and the assertions about the workings of contraceptives did not appear to be completely off-limits. Justice Alito writes in the majority opinion:

As we have noted, the [plaintiffs] have a sincere religious belief that life begins at conception. They therefore object on religious grounds to providing health insurance that covers methods of birth control that, as HHS acknowledges, see Brief for HHS in No. 13–354, at 9, n.4, may result in the destruction of an embryo.⁶²

In this very short statement, Justice Alito appeals to HHS acknowledging that the contraceptives could have post-fertilization effects. This is of course not merit-

⁶¹Opinion of the Court, 573 U. S. ____ (2014), p12

⁶² Opinion of the Court, 573 U. S. ____ (2014), p9

assessment as such; rather Alito is saying that the defendant does not object to the plaintiff's factual claim. Had HHS not conceded that the contraceptives could have these post-fertilization effects, then the claim may have been subject to further scrutiny.

Interestingly, the footnote referenced by Justice Alito from the HHS brief⁶³ cites product labels that medical experts have described as outdated and not reflective of current research. The issue of outdated FDA product labels functioning as primary evidence was also brought up in an amicus brief⁶⁴ to the court that was submitted on behalf of major players in the medical establishment.

Relying on product labels as primary evidence seems a little bizarre⁶⁵. If the product labels had been updated, how would this have impacted the case? If the plaintiffs had based their claim on the product labels and HHS had argued against their claim on the basis of contemporary scientific research, what should the Court do? In the following, I will go through some hypothetical scenarios for the *Hobby Lobby* case to see how the religious evidence rule would apply.

We can imagine a scenario in which HHS argued, along with major players in the medical establishment, that some of the contested contraceptives do not have the purported post-fertilization effects. According to the religious evidence rule, the Court could not regard such a dispute between plaintiffs and the government off-limits, they would need to adjudicate this dispute, since it is a factual dispute that is not grounded in religious evidence. At this point things would get complex though, because the Court would be adjudicating conflicting claims in an area of scientific uncertainty. When adjudicating disputes in areas of medical and scientific uncertainty, there is precedent

⁶³ Brief for HHS in No. 13–354, at 9, n. 4

⁶⁴ Brief of *Amici Curiae* Physicians for Reproductive Health et al., *Sebelius v. Hobby Lobby Stores, Inc.*, 2013, No. 13-354

⁶⁵ Also the selection of disputed contraceptives all of a sudden appear somewhat random since product labels for certain birth control pills also state that the contraceptive could have post-fertilization effects “other possible mechanisms may include...endometrial changes that reduce the likelihood of implantation.” http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/021676s012lbl.pdf
http://www.accessdata.fda.gov/drugsatfda_docs/label/2012/021098s019lbl.pdf

for the Court to apply a legislative deference standard: fact-finding would be deferred to Congress. In *Cahart v. Gonzalez*, the Supreme Court case concerning whether the Partial Birth Abortion Act should include exceptions when necessary for women's health, scientific uncertainty existed on the question of whether the partial birth abortion (or Dilate and Extract) procedure would ever be medically necessary. In this case, the Court upheld the legislative deference standard and stated that "medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts"⁶⁶. The Court deferred to legislative fact-finding, even while recognizing that congress had indeed made claims that were questionable or erroneous. Ironically, one of the claims that the Court found to be erroneous was a claim about the medical uncertainty itself: the claim that "there existed a medical consensus that the prohibited procedure is never medically necessary."⁶⁷

It is unclear whether the legislative deference standard would apply in the *Hobby Lobby* case if HHS were to challenge the objector's claim about the workings on contraceptives and insist that there was no risk of post-fertilization effects associated with the four contraceptives. If the government had drawn this over-confident conclusion about contraceptives, they would be acting much like they did in *Gonzales v. Cahart* in which the government deemed that there were no health risks associated with banning the partial birth abortion (Dilate and Extract) procedure. They would thus be neglecting the medical uncertainty involved in this question and the question is whether the Court could interfere at this point. Since my focus is the limits of the hands-off approach, I will not pursue the complex question of whether the legislative deference standard would apply any further.

Whether or not the legislative deference standard applies, it seems clear that the hands-off approach would *not* apply to the objector's claim about the risk associated with the four contraceptives. Determining the level of risk of post-fertilization effects would still be a scientific and not a religious question and thus a question that would be subject to

⁶⁶ *Gonzales v. Carhart*, 127 S. Ct. 1610, 1636 (2007). For interesting discussions on legislative deference in this and other cases involving scientific uncertainty see (Tai 2014)

⁶⁷ *Id.* At 1638

merit judgment by the Court. It is unclear, however, if it would have made a difference in the case, had HHS been over-confident in rejecting the plaintiff's factual claims. Had the science not been so fuzzy on the edges and had the medical community been able to confidently deny the risk of post-fertilization effects, then the Court would have been warranted in arguing that the law did not pose a *substantial* burden on the plaintiffs' religious exercise. They would not be warranted in rejecting that the law posed a burden altogether, because even if a burden is not rooted in reality, a *felt* burden is still a burden. However, if it was abundantly clear that their concern was simply uniformed, then it also seems clear that the substantiality claim should be rejected.

HHS could have taken a third approach: they could have insisted that it was *highly unlikely* that the disputed contraceptives would ever have post-fertilization effects. This claim would accord with a very broad intra-scientific consensus that these contraceptives rarely if ever would have such effects. It is indeed a little surprising that HHS did not take this approach. HHS could have argued that since the risk of the destruction of an embryo is so miniscule, this risk could not warrant an exemption, since the burden would not be substantial.

At this we point, we would be venturing into the territory of normative claims. The claim that a small risk poses a substantial burden would likely rest on religious evidence. The answer to the question of whether accepting such a risk is a grave moral wrong, would require interpreting the moral code of the plaintiff's religion and thus resolving religious questions.

Now as part of testing the *sincerity* of the claim the Court could inquire into the question of whether the plaintiffs had indeed formed a view on this issue to which they were deeply committed. Although they would be in touchy territory, the Court may be able to inquire into whether the plaintiffs had a sincere religious concern with the miniscule risk of post-fertilization effects or whether perhaps other beliefs (such as religious concerns with contraceptives in general) were playing a decisive role⁶⁸.

⁶⁸ Although this claim would also be grounded in religion, it is indeed a different objection that which could potentially lead to a different outcome

Since RFRA requires that accommodations be given only when a substantial burden is at stake, the Court may also decide to enter otherwise forbidden territory and make a determination about the degree to which the burden is substantial (Levine 2009:799 fn. 18). Some disagreement exists on the how the ‘substantial test’ should be understood: whether it is or is not up to the courts to determine when a burden is substantial i.e. whether the objector’s assessment of substantiality must be taken at face-value (Smith 2014:103-105). In *Hobby Lobby* the majority found that inquiry into the substantiality question inappropriate. Alito writes in the majority opinion “it is not for us to say that their religious beliefs are mistaken or insubstantial.”⁶⁹ The dissent objected to this more uncommon interpretation of RFRA’s substantiality prong. In the written dissent, Ginsburg argued that “Congress no doubt meant the modifier “substantially” to carry weight”⁷⁰ and further that “the connection between the families’ religious objections and the contraceptive coverage requirement is too attenuated to rank as substantial.”⁷¹ The religious evidence rule does not concern this particular complicity question which is arguably normative in nature, i.e. it concerns when a certain action is morally permissible or forbidden. The religious evidence rule concerns factual claims only. A related concern may of course arise about factual claims based on religious evidence. This is a difficult and controversial issue about which one may have to concede that RFRA’s substantiality prong can in certain situations justify a violation of hands-off practice. I will not pursue this difficult question here.

Factual claims based on non-religious evidence may importantly also have an impact on the question of whether or not a burden should be considered substantial. As previously mentioned, had the science on the workings of contraceptives been more certain, then the burden on the plaintiffs could reasonably be deemed insubstantial. According to the religious evidence rule, the factual claims about the workings of contraceptives are open

⁶⁹ *Burwell v. Hobby Lobby* 573 U.S. ____ (2014) , p37

⁷⁰ *Burwell v. Hobby Lobby* 573 U.S. ____ (2014), p20

⁷¹ *Burwell v. Hobby Lobby* 573 U.S. ____ (2014) , p22

to merit assessment and the Court may reasonably question a burden that relies on non-religious, factually erroneous evidence.

3. Factually erroneous claims in *Priest for Life et. al. v. HHS*

The religious evidence rule could have provided some clarity in a recent case following *Hobby Lobby*. *Priests for Life et. al. v. HHS* was one of several cases challenging the accommodation mechanism used to exempt religious nonprofits from ACA's contraceptive mandate. Religious nonprofit groups have a special status under ACA and are able to opt-out of the contraceptive mandate on religious grounds. Some nonprofit organizations have, however, objected to the opt-out process which has the organization fill out a two-page 'self-certification' form stating their objection to provide the coverage. These religious non-profits are arguing that this form 'triggers' contraceptive services by another agent and engaging in such 'triggering' (by sending the form) makes them complicit in sin.

In the oral argument in the United States Court of Appeals for the D.C. Circuit, the lawyer for Priests for Life, Robert Muise and Judge Rogers came to discuss whether the objectors' factual claims about triggering must be taken at face-value. Judges in previous trials had argued that the claim that the self-certification form triggers contraceptive services is factually wrong; that it is rather federal law (Affordable Care Act) and not the self-certification form that obligates third parties to provide the service. In the oral argument, discussion came to concern whether or not the plaintiffs could rely on factually erroneous claims about triggering. Muise was insisting that the court had to accept the plaintiffs' claim about triggering, whether or not the claim was factually erroneous. Testing this claim, Judge Rogers asked some hypothetical questions concerning a famous Supreme Court case: *Thomas v. Review Board of the Indiana Employment Security Division*.

Thomas v. Review Board concerned a Jehovah Witness who had been denied state unemployment benefits after quitting his job at a steel foundry. The plaintiff quit his job because he had been transferred from a roll foundry which manufactured steel for a variety of industrial purposes to a department that manufactured turrets for military

tanks. The transfer was due to the closure of the roll foundry and all other available departments were directly engaged in manufacturing weapons. The plaintiff quit due to his religious beliefs that engaging in such activity was a moral wrong. The plaintiff was unable to deliver precise or consistent reasons for his claim that the activity would render him complicit in moral wrong according to his religion. The perceived inconsistency of the plaintiff's claims was decisive in the lower court's (Indiana Supreme Court) denial of his accommodation (and thus denial of his right to receive unemployment benefits). The Supreme Court, however, famously held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection"⁷² and the plaintiff ultimately won the case.

In the *Priests for Life* oral argument, Judge Rogers asked the following hypothetical question about the *Thomas v. Review Board* case:

Judge Roger: Would it have been open to the Court to have found that in fact, as a matter of fact, the munitions factory for which [the plaintiff] worked was not supplying arms for the war, that in fact it was supplying gadgets for tractors used on farms? Could the Court have examined whether his statement about what his employer was doing was correct?

To which Muise answered

Muise: Even if the religious belief is based on a factual error, the court must accept that factual error,"⁷³

Of course, it should now be clear that according to the religious evidence rule, lawyer Muise is wrong in his answer because the evidence that would settle the question would not be religious in nature.

⁷² 450 U.S. 707 (1981) at 714.

⁷³ I rely on Professor Marci A. Hamilton and Professor Leslie E. Griffin's discussion of this issue in their post: 'A tractor is not a gun even if you sincerely believe it is', HAMILTON AND GRIFFIN ON RIGHTS, <http://hamilton-griffin.com/a-tractor-is-not-a-gun-even-if-you-sincerelybelieve-it-is>. In the above citation I use Griffin and Hamilton's transcription of the oral argument.

In *Priests for Life* the plaintiffs ended up losing the case in U.S. Court of Appeals for the District of Columbia Circuit, partly due to their purported⁷⁴ misunderstandings regarding how the accommodation mechanism works. In the case, the court rejected the plaintiffs' motion to prevent the court from evaluating the substantiality of the claim⁷⁵, insisting that substantiality was for the court to decide and it did indeed hold the burden on the plaintiff was not substantial. The court failed, however, to show how their substantiality test in this case was in accordance with hands-off practice i.e. that they were questioning neither sincerity nor the merit of *religious* claims. *Priests for Life* provided an excellent example of how the religious evidence rule should work. The only missing part was a clear articulation of the rule.

4. Applying hands-off to non-religious factual claims exceeds the principle's rationale

In the following, I will list some common reasons used to justify the hands-off religion approach and then zoom in on those reasons that would be relevant to the religious evidence rule.⁷⁶ For now I set aside the issue of whether the reasons are good or bad. A brief reflection on these reasons should make clear that when hands-off is applied to religious objectors' factual beliefs that do not draw on religious evidence, it is operating beyond the scope of what its rationale can justify.

Reasons used to justify the hands-off approach include the following: 1) religious claims cannot be subject to *reasoned analysis*. Religious claims lie outside the realm of reason and therefore defy merit assessment. 2) Courts do not have the *competency*⁷⁷ to evaluate religious claims: the knowledge required is too specialized and complex. 3)

⁷⁴ I set aside the question of whether or not the court was right in rejecting the causal connection between sending the form and the third party administering the contraceptives

⁷⁵ *Priests for Life et al. v. HHS* No. 13-5368, Circuit judge Pillard opinion p26-32

⁷⁶ I am much in debt to Richard Garnett's (Garnett 2009) discussion of the reasons supporting the hands-off approach

⁷⁷ See for example *Thomas v. Review Bd. Ind. Employment Sec. Div.*, 450 U.S. at 716: (it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith), see for discussions on this rationale also (Garnett 2009:857) and (Lupu, Ira C. & Tuttle, Robert W. 2014, chapter 2)

Courts' entanglement with religion may *corrupt* religion, religion may be "damaged or degraded from state involvement in it" (Koppelman 2013:71), when courts impose their judgment on religion, this may have a corrupting effect on the good of religion. Religion must thus be protected from such imposition. 4) Courts do not have the *power* to resolve religious questions (Garnett 2009:861), the right to resolving religious questions is constitutionally assigned to religious bodies (Goldstein 2005:204) and practitioners. 5) Courts may be *biased* when assessing religious claims. Judges and justices may be biased in particular toward familiar majority religions (thus disfavoring the claims of minority religions) or toward common ways of practicing familiar religions (thus disfavoring less common beliefs of individuals and sub-groups within the religion). 6) Finally, courts' entanglement with religious questions may violate norms of *public reason*. Religious exemption cases concern the basic rights and duties of citizens, public reason advocates should want such regimes⁷⁸ to accord with the norms of public reason. To be in accordance with public reason, courts should not only remain neutral with regard to religion, they should remain neutral between conceptions of the good more generally and they should rely only on public standards of inquiry. If courts got involved in resolving religious questions, they would too easily violate such constraints by privileging certain conceptions of the good or by engaging in non-public methods of inquiry.⁷⁹

The question now is whether any of the abovementioned reasons could be employed to justify treating an objector's factual claim based on non-religious evidence as hands-off in terms of merit judgment. I think it is pretty clear these reasons could not justify employing the hands-off approach in this way. To see why think of the *Hobby Lobby* claim about the workings of contraceptives. 1) The claim can be subject to reasoned

⁷⁸ Here I am setting aside the question of whether public reason liberals have good reason to endorse a religious exemption regime at all.

⁷⁹ Note that some of these rationales exclude each other. It is not possible to subscribe to both the corruption rationale and the public reason rationale. The corruption argument rests on the idea that religion is valuable. According to Koppelman treating religion as valuable is justifiable so long as 'religion' is understood in very broad and abstract terms: "government is permitted to treat religion as a valuable thing, but only if "religion" is understood at such a high level of abstraction that the state is forbidden from endorsing any theological proposition, even the existence of God" (Koppelman 2009). Political liberals would not want to treat religion, even in such abstract terms, as valuable.

analysis. It is not founded on any kind of supernatural, mystical or otherwise unreasoned evidence that somehow surpasses rational inquiry.⁸⁰ 2) The Justices are as competent at assessing the claim as they are at assessing any other piece scientific evidence. Certainly, the competency of the Justices to evaluate scientific evidence in general is to a certain extent limited, but that is separate question. 3) The corruption of religion argument does not seem to apply. The Court is merely settling the non-religious facts involved in the case and it is thus not imposing its (potentially corrupting) judgment on religious questions. 4) The Court does not exceed its power in evaluating the merit of this claim. In no immediate sense is the Court getting entangled in resolving religious questions that, according to ideals of church-state separation, should be deferred to religious institutions or practitioners. It would indeed be very strange if the plaintiffs or their church claimed unique authority on the question of how contraceptives work. 5) Since the empirical claim was based on ordinary scientific evidence or simply on readily available non-religious evidence (like FDA product labels) the risk of religious bias does not seem to be present or at least it would be very small. In *Hobby Lobby*, the concern that a predominantly Catholic court would be biased toward contraceptive concerns in general is real. However, had the Court engaged in more detailed merit assessment of the claim that the given contraceptives had post-fertilization effects, the idea that the Court would be biased in their evaluation of the scientific evidence is more of a stretch. 6) In a similar vein, the Court would not be violating strictures of public reason in evaluating non-religious, factual claims about contraceptives. The Courts would not be relying on sectarian conceptions of the good, it would simply be assessing readily available scientific evidence. Since the fact in dispute is not based on religious evidence, the Courts does not engage in sectarian religious methods of inquiry.

5. Identifying religious evidence

While applying hands-off to objectors' non-religious factual claims cannot be justified with reference to the rationale behind the hands-off approach, it may be justified by pragmatic reasons. An obvious pragmatic concern with applying the religious evidence

⁸⁰ Neither are many religious beliefs, but that is a separate issue.

rule is the difficulty involved in discerning religious evidence. The courts purposely reject identifying religion and operate with a broad and flexible understanding of the religious.⁸¹ They do so for good reasons. The nature of religious beliefs varies greatly between the range of majority, minority and emerging religions. Furthermore, the nature of religious beliefs and practices not only varies greatly between religions, but also within religions. Famously, religion has been expanded to encompass conscientious objections to war. In *United States v. Seeger* the Supreme Court held that the judicial understanding of religious beliefs should include “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.”⁸² It is very difficult if not impossible to articulate a set definition of religious belief that encompasses this diversity (Cornelissen 2012). The same goes for religious evidence, by which I merely mean the basis of a religious belief. As previously mentioned, examples of this basis could be scripture, tradition, religious authorities and comprehensive philosophical views on human existence.

I think it is possible to grant these concerns and still maintain the religious evidence rule. Just like courts must and do decipher whether an objector’s claim is over-all sincere and religious in nature, they should and can apply this fallible and delicate evaluation to the claim’s constitutive parts. If they were not allowed to do so, the fear of an anarchic exemption regime would certainly be warranted. In the following, I will look at the pragmatic concern concerning the difficulty of identifying religious evidence as it applies to the *Hobby Lobby* case.

5.1 Dorf on the difficulty of deciphering non-religious factual claims

⁸¹ Stabs have been taken at some rough guidelines. Judge Adams of the Third Circuit has offered the following guidelines for identifying religion: (1) “religion addresses fundamental and ultimate questions having to do with deep and imponderable matters,” (2) is “comprehensive in nature ; it consists of a belief-system as opposed to an isolated teaching.” and (3) it often involves “formal and external signs” such as ceremonial functions, recognized experts, structure and organization and official texts See: *Malnak v. Yogi* 592 F.2d 197 (3d Cir. 1979) and *Africa v. State of Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981)

⁸² *United States v. Seeger*, 380 U.S. 163, 176 (1965)

In his blog ‘Dorf on Law’, law Professor Michael Dorf from Cornell University uses *Hobby Lobby* to make the, sometimes overlooked, point that religious claims can be normative *as well as* factual-empirical and that the latter category of claims must be protected along with the first. He uses the example of a state that has an RFRA statute equivalent to the federal RFRA and a law requiring that evolution be taught in biology classes. A religious teacher refuses to teach evolution as true and the principal at the school insists that she should indeed teach evolution as true, because he insists that it *is* true, regardless of the empirical inferences the teacher draws from her religion. Dorf concludes that if the religious teacher files an exemption case under the state RFRA, ‘it is clear that the teacher gets to be the judge of whether teaching evolution violates her religious beliefs’. Even though the compelling interest test may render her case unsuccessful, it ‘gets off the ground’⁸³ as a sincere religious exemption claim.

According to the religious evidence rule, we can agree with Dorf that the teacher in the above example would have a religious exemption claim to bring to court and that the court could not assess the merit of her (religiously grounded) empirical beliefs about falsity of the scientifically established theories on evolution. At the same time, we can still resist the claim that the same goes for the plaintiffs in *Hobby Lobby*. Dorf, however, rejects drawing this distinction between the teacher and the plaintiffs in *Hobby Lobby*. He writes

[the *Hobby Lobby*] plaintiffs present a somewhat harder case because their scientifically false belief about how IUDs and the morning-after pill function might be thought to be rooted in a simple scientific error, rather than a decision to follow religion rather than science. But I think that even that distinction probably doesn't hold up [....] The rejection of the authority of the scientific community is itself often rooted in religious beliefs. Biblical literalists and other religious conservatives may use a different epistemology. Moreover, sometimes it will be difficult to distinguish an empirical claim from a more purely religious claim, precisely because many religious claimants believe that these magisteria overlap.⁸⁴

⁸³ <http://www.dorfonlaw.org/2014/07/hobby-lobby-post-mortem-part-3.html>

⁸⁴ *Id.*

Dorf's concern is thus of the pragmatic kind already sketched out: it concerns the difficulty of discerning whether or not the plaintiffs' claim draws on religious evidence. Perhaps the plaintiffs in *Hobby Lobby* have a religiously-based distrust in science, perhaps they subscribe to a different epistemology that is in a certain sense religious. These are the kind of complexities that the courts face when attempting to decipher whether empirical claims draw on religious evidence

While these concerns are valid, they are not insurmountable. Courts can inquire about beliefs without assessing merit: "[courts] may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in" (Goldstein 2005: 501). If some Justices were in doubt about whether the plaintiff's claims were grounded in religiously based distrust in science or on epistemic principles that in some sense could be deemed religious, then they would be able to pursue these questions. Courts can inquire *about* religion without getting submerged in resolving religious questions. As Goldstein puts it "courts may not tell people what they should do or believe, but they may determine, in the sense of making factual findings, what beliefs people hold and what practices they engage in." (Goldstein 2005: 501). Inquiring into the question of whether or not a particular claim is based on religious evidence is inquiring *about* religion⁸⁵ and thus very different from resolving religious questions. If in carrying out the inquiry on whether the plaintiffs in *Hobby Lobby* were indeed drawing on religious evidence in their claims about the workings on contraceptives, then the Court could just stop their inquiry there and apply hands-off to this factual claim. Of course, there will be borderline cases: the connection between religion and a general distrust in science may reasonably be deemed too vague to justify hands-off. The courts would have to apply their fallible judgment when drawing these boundaries.

Certainly when courts apply their fallible judgment in delineating the boundaries of religious evidence, they enter controversial territory. Courts may search for familiar religious evidence and thus neglect unfamiliar religious evidence associated with

⁸⁵ "courts routinely undertake extensive fact-finding into the content of religious doctrines and practices in determining whether a practice or doctrine is "religious" (Goldstein 2005:538)

minority or emerging religions that are outside the court's radar. The boundary for what counts as religious evidence may therefore be drawn too narrowly. When drawing the boundary too narrowly the Religion Clauses would be jeopardized: the establishment clause would be jeopardized because courts would be favoring some religions over others and the free exercise clause would be jeopardized because the free exercise of certain religious groups would be curtailed. If on the other hand, the courts were too precautionary and included too much evidence in the category of the religious, religious exemption claims would easily get out of hand.⁸⁶ While I will not reject the concern that courts may *at times* (in reality this is really rare⁸⁷) have difficulties drawing the distinction between religiously grounded factual claims and non-religious factual claims, I do think that the religious evidence rule strikes a reasonable balance between the abovementioned concerns. It is sensitive to the fact that religious objectors make normative as well as factual claims based on religion and it grants autonomy to religious bodies and agents in determining the merit of these claims. At the same time, it sets a boundary at factual claims that by the courts best judgment do not draw on religious evidence.

To sum up, if we grant that courts should follow a hands-off religion practice, then hands-off should apply to religious objectors' factual beliefs only insofar as they draw on religious evidence. Hands-off thus applies to all factual and normative claims that draw on religious evidence. Courts can and should still assess the sincerity of claims (normative and factual) based on religious evidence. This boundary is critical if the type of anarchic exemption regimes that exemptions critics fear is to be avoided.

⁸⁶ It has been argued that dilemmas like these suggest that we should rid ourselves of the tenable distinction between the religious and the non-religious categories that for the purpose of providing exemptions will likely result in favoritism of certain religions over others and religion over non-religion (Eigruber & Sager 2007). For the purpose of this paper, I will not be able to include the much discussed question of whether religion is special or is something deserving of special treatment. In this paper, I merely grant that it is and that *religious* exemptions regimes in some form are warranted.

⁸⁷ I rely on here on Andrew Koppelman (Koppelman 2013:7) who writes that "Courts almost never have any difficulty determining whether something is religion or not". Koppelman draws this conclusion from reviewing the legal reference book *Words and Phrases* in which contested definitions of words "whose meaning determines rights, duties, obligations and liabilities of the parties" in cases from 1658 to present. Of course, the fact that courts very rarely have difficulties determining whether a claim is religious does not tell us anything about whether the courts are operating with a desirable or coherent understanding of religion

Some may object that the all-the-way-down religious evidence rule goes too far and should be discarded and some may object that the rule does not go far enough. I will address these concerns in turn. By discarding the all-the-way-down religious evidence rule, I would argue we would indeed end up with an anarchic religious exemption regime. To get an idea of the anarchic nature of an exemption regime that did not decipher between the objectors' empirical claims, it may be useful to turn to some examples harbored in a concern raised by HHS and the principal dissent in Hobby Lobby.

Would the exemption the Court holds RFRA demands for employers with religiously grounded objections to the use of certain contraceptives extend to employers with religiously grounded objections to blood transfusions (Jehovah's Witnesses); antidepressants (Scientologists); medications derived from pigs, including anesthesia, intravenous fluids, and pills coated with gelatin (certain Muslims, Jews, and Hindus); and vaccinations (Christian Scientists)

While this concern was raised in response to the Court's controversial decision of interpreting "person" under RFRA to include "closely held" corporations, the examples mentioned give a good picture of the difficulty the courts would face, if religious objectors could make all kinds of factual claims (religiously grounded or not) about a wide range of medical procedures. Any factual claim could be made about any medical procedure such as the workings of antidepressants, vaccines, anesthesia etc. and the government would be subject to the compelling interest test each time.

It could also be argued that the religious evidence rule does not go far enough. If the argument here would be that hands-off should apply only to normative claims and not to factual claims, even when these are based on religious evidence, then we would need some argument for making this distinction between normative and factual claims for the purpose of hands-off practice. I don't see how such an argument can be made. Clearly, the rationale for hands-off practice applies equally to factual and normative claims: courts are not more competent, no less biased etc. when it comes to assessing factual

claims based on religious evidence, than they are with regard to normative claims. However, if the argument would be that the religious evidence rule should not be the only limitation to the hands-off approach, I would agree. The religious evidence rule cannot (and does not) stand alone in limiting the scope of the hands-off approach. As I mentioned in section 2.2, another significant limitation that plays a role in limiting the hands-off approach is the sincerity limitation. Courts can and do evaluate the sincerity of religious objectors' claims. Furthermore, courts can and should be able to inquire *about* religion and religious evidence without getting submerged into resolving religious questions. Finally, while the verdict seems to be out on whether or not courts can question substantiality, allowing for such arbitration could curtail the hands-off approach as applied to religiously grounded factual claims.

Concluding Remarks

Recent contraception cases like *Hobby Lobby* and *Priests for Life* have shown that some perplexity exists on the issue of adjudicating factual disputes involving religious objectors. I have in this paper argued that the all-the-way-down religious evidence rule should always be followed. . Nothing in the rationale for the hands-off approach speaks for discarding this rule. A practical concern with employing the rule is the problem of identifying religious evidence. Identifying religious evidence as the basis for the beliefs and reasons that constitute an objector's religious exemption claim is not very different from the task of determining whether an over-all claim is religious in nature. In fact courts generally have a fairly easy time determining whether something is religious or not. It is nonetheless a very delicate task and courts are no doubt fallible in making these judgments. I have, however, argued that the practical concerns associated with discarding the religious evidence rule are much greater than the practical concerns associated with employing the rule.

It is an important time to articulate boundaries for the hands-off approach. Now that 'closely held' corporations have acquired 'person' status under RFRA, a new category of claims can make their way to the courts. If these corporations are allowed to rely on their own view of the facts, religious or not, then RFRA exemptions could easily get out of hand.

References

- Cornelissen, Gemma. 2012. Belief-based Exemptions: Are Religious Beliefs Special? *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*.
- Eisgruber, Christopher L. & Sager, Lawrence. 2007. *Religious Freedom and the Constitution*. Harvard University Press
- Garnett, Richard W. 2009. A Hands-off Approach to Religious Doctrine: What are We Talking About, 84 *Notre Dame L. Rev.* 837
- Goldstein, Jared A. 2005. Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs, 54 *CATH. U. L. REV.* 497
- Greenawalt, Kent. 1998. Hands Off! Civil Court Involvement in Conflicts over Religious Property, 98 *COLUM. L. REV.* 1843, 1844 Greenawalt, Kent. 2008. *Religion and the Constitution: Volume 2: Establishment and Fairness*, Princeton: Princeton University Press
- Koppelman, Andrew. 2013. *Defending American Religious Neutrality*. Cambridge: Harvard University Press
- Laycock, Douglas. 2011. *Religious Liberty: The free exercise Clause*. Cambridge: Eerdman Publishing
- Levine, Samuel J. 2009. ‘The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction’, *Notre Dame Law Review*, Vol. 84, No. 2
- Lupu, Ira C. & Tuttle, Robert W. 2014. *Secular Government, Religious People*. Cambridge: Eerdman publishing
- McConnell, Michael. 2000-2001. ‘The problem with singling out religion’. 50 *DePaul L. Rev.* 1
- Volokh, Eugene. 1999. Common-Law Model for Religious Exemptions, 46 *UCLA L. Rev.* 1465.

Social Epistemic Liberalism and the Problem of Deep Epistemic Disagreements

By Karin Joench-Clausen and Klemens Kappel⁸⁸

Penultimate draft. Published in *Ethical Theory and Moral Practice*, Volume 18, Issue 2 (2015), Page 371-384

1. Introduction

Consider the problem of finding a justification of liberal democracy that meets the *liberal principle of legitimacy*: fundamental political principles, laws and institutions, to be legitimate, must be justifiable from the point of view of all reasonable citizens. At the same time, this justification must meet the challenges posed by the *fact of reasonable pluralism*: in a free society people will always subscribe to a plurality of reasonable yet conflicting comprehensive doctrines (Rawls 2005, p. 59), we should therefore not expect that any one comprehensive doctrine can be accepted by all reasonable citizens.

John Rawls famously drew the conclusion from this purported fact about free societies that since supporters of liberal legitimacy want our fundamental laws and political principles to be justifiable from all reasonable citizens' points of view, no one comprehensive doctrine can legitimately ground the justification for a free society's basic political structure.

Rawls proposes a solution to this problem, involving the idea that a justification must be 'freestanding' (Rawls 2005, p. 12). The justification of liberal democracy must avoid implying or relying on any specific comprehensive doctrine, and yet remain compatible

⁸⁸ For valuable input and criticism of our paper earlier stages, we would like to thank the participants at the workshop on workshop on 'Disagreement and Legitimacy: Value Questions and Factual Questions', University of Copenhagen February 10-11, 2011 and the participants at University of Copenhagen and the participants at 'Three Rivers Philosophy Conference: Science, Knowledge and Democracy', University of South Carolina.

with the full range of reasonable worldviews. Rawls developed a theoretical framework for this kind of political justification. Many commentators have, nevertheless, remained sceptical of the consistency and feasibility of Rawls's political liberal solution. Much critique has been directed at the theory's concept of reasonableness which is vague and, according to many critics, excludes too many or much from the realm of justification.

Recently, Robert Talisse has proposed the highly interesting suggestion that there is an epistemic justification of the core institutions of liberal democracy. Rather than basing political justification in our moral commitments we should, argues Talisse, ground the justification of liberal democracy in our common *epistemic* commitments. In so doing we will, according to this theory, expand the realm of justification and thus overcome some of the problems inherent in the political liberal solution. Roughly his idea is this: simply in virtue of holding beliefs one is rationally committed to certain basic norms of evidence and reason-responsiveness. In virtue of this commitment, one will also be rationally committed to endorse the institutional arrangements securing a free exchange of reasons and evidence. Such institutions are partly constitutive of liberal democracy. Hence, when reflecting on our most basic epistemic commitments, we see that we are rationally committed to upholding these liberal democratic institutions. This holds no matter which moral or religious worldview one subscribes to. The argument thus purports to be a *public justification*, by which we mean a justification that can be endorsed from all reasonable citizens' points of view. Talisse categorizes this kind of view as social epistemic liberalism, and argues that this is a kind of liberalism that breaks with central strictures of Rawlsian political justification, but is nonetheless still able to accommodate the fact of reasonable pluralism in virtue of being a public justification that crosses the boundaries of reasonable moral, philosophical and religious worldviews (Talisse 2008).

Our main focus of this paper will be Talisse's epistemic justification of liberal democratic institutions, and we will argue that while interesting and important, it ultimately fails as a successful public justification. We attribute this failure to the obstacle of *deep epistemic disagreements*: a term which in the context of this discussion

will refer to disagreements that individuals may have concerning which basic epistemic norms and principles are truth conducive in a given domain.⁸⁹

Before engaging with this argument, it is worth noting how Talisse's justification differs from similar approaches. The general idea that institutions facilitating open reason-exchange can be defended epistemically on part of their corrective features was emphasised by John Stuart Mill, who argued that human judgment can be relied on only when the 'means of setting it straight are kept constantly at hand' (Mill 1870, p. 12). Here Mill refers to the institutions of freedom of thought and discussion, facilitators of proper inquiry under which 'wrong opinions and practices gradually yield to fact and argument' (Mill 1870, p. 12). The gist of Mill's epistemic argument is that in the collision of adverse opinions, that will take place under free discussion, false beliefs will gradually be corrected, half-truths will become whole and whole truths, withstanding thorough scrutiny, will be better understood.

However, for Mill, the pursuit of free and proper inquiry ultimately matters because it is crucial to developing individuality, and the development of individuality is an essential human good. Mill's theory is thus perfectionist in the sense that it asserts a value that, in Mill's view, applies to all. According to Rawls, Mill's theory therefore 'fails to satisfy, given reasonable pluralism, the constraints of reciprocity, as many citizens [...] may reject it' (Rawls and Freeman 1999, p. 586). Thus, from a political liberal perspective the problem with Mill's argument is that it cannot be reasonably expected to be endorsed by all reasonable citizens.

Allen Buchanan has offered a socio-epistemic justification of core liberal democratic institutions that he takes to be compatible with political liberalism (Buchanan 2004). Buchanan argues that any rational citizen will be concerned with reducing the risks associated with socially instilled false beliefs and therefore will endorse key liberal institutions for their epistemic benefits. The general idea in Buchanan's argument is that

⁸⁹ Michael Lynch uses this term and offers a thoroughgoing analysis of the concept of deep epistemic disagreements (see Michael Lynch 2010). Our definition is more crude than the one employed by Michael Lynch and does not rely on the specifics of this interesting discussion.

we are, due to our limited cognitive abilities, socially dependent on other people and institutions for true beliefs. This dependency puts us at risk of adopting false beliefs. Now Buchanan argues, quite reasonably, that avoiding false beliefs and acquiring true beliefs about the world is important if we want to ‘ensure that we act appropriately on prudential or moral principles’ (Buchanan 2004, p. 108), *whatever these principles may be*. Therefore, any rational citizen concerned with furthering her moral principles and well-being will want to minimize the epistemic risks associated with our social epistemic dependency. This epistemic risk is best managed when liberal institutions securing free flow of information, positions of epistemic authority based on merit, equal opportunity, and accountability on part on the government and epistemic authorities in society, are in place. Therefore, whatever our moral commitments may be, if we take them seriously, we will also commit to these key liberal institutions. Buchanan claims that this socio-epistemic argument for key liberal institutions is compatible with the strictures of political liberalism, since the argument can be made without relying on any comprehensive moral conception. Buchanan’s socio-epistemic argument relies only on the assumption that one cares about reducing prudential and moral risk, not upon any particular specification of what welfare (or happiness) is or any particular conception of morality (Buchanan 2004, p. 100).

Talissee and Buchanan agree on this starting point: that a justification based on epistemic commitments can cross the boundaries of diverse and conflicting moral worldviews. However, Talisse points out that to the extent that the socio-epistemic justification assumes that we all have the same, overriding epistemic reason to endorse liberal democracy, the justification *does* transgress constraints of political liberalism. According to Talisse, Buchanan’s justification must be based on a (at least partially) comprehensive philosophical doctrine ‘about the epistemic good and its relation to moral judgement’ of the kind that the political liberal must seek to avoid (Talissee 2008, p. 114). So, Buchanan’s justification is not ‘freestanding’ in the sense that individuals find reasons from within their respective comprehensive worldviews to support liberal democratic institutions. Rather, individuals are offered the one and same epistemic reason to endorse these institutions. In Rawls, a worldview (or doctrine) is comprehensive as soon it transgresses the political and includes non-political values and

virtues (Rawls 2005, p. 175) and the socio-epistemic justification must include such a value: to remain forceful Buchanan's justification must commit itself to the overriding value of epistemic risk reduction (Talisse 2008, p. 114). Buchanan's argument thus fails, according to Talisse, in its attempt to seek compatibility with political liberalism.

Whether Buchanan's argument is really open to this criticism or not, Talisse proposes an epistemic justification of liberal democracy that does *not* strive for compatibility with political liberalism, but nonetheless purportedly accommodates the justificatory challenge that accompanies a recognition of the fact of reasonable pluralism. Talisse's proposed justification in fact purports to be a *counter-example* to Rawls's crucial premise in political liberalism: that no one comprehensive doctrine can be endorsed by all reasonable citizens (Talisse 2008). Talisse's claim is that an epistemic doctrine based merely on a commitment to certain very basic epistemic norms can be endorsed by all reasonable citizens, and thus form a basis for a public justification of the core liberal institutions. In this paper we argue that Talisse fails to provide a successful public justification of core liberal institutions.

2. The socio-epistemic justification of liberal democracy

Let us first consider Talisse's argument. Here is our reconstruction:

(T1) *Rational believers* operate in compliance with a set of basic epistemic norms (EN). Roughly EN comprises the idea that rational believers aim at believing truly, and that in doing so, they need to be responsive to evidence and reason. EN further holds that to hold a belief involves incurring an obligation to articulate one's reasons, evidence, and arguments when incited to do so. Finally, to articulate one's reasons is to enter into a social process evidence and reason-exchange.

Sometimes we will refer to the feature of rational believers asserted in (T1) as reason-responsiveness. So, at least for rational believers, beliefs are reason-responsive. Talisse emphasizes that he assumes what he calls a folk conception of epistemology when he

refers to the norms of EN. This implies that the detailed philosophical specification of 'reason', 'evidence' and 'argument' is left undetermined, just as when philosophers routinely refer to our folk-psychological notions of beliefs and desires and leave the exact nature of these notions undetermined. Focus is thus on the everyday use of terms like 'reason', 'evidence' and 'argument' (Talisse 2009, p. 85).

We qualify (T1) to concern believers that are rational, while Talisse tends to merely talk about believers, that is, subjects who hold beliefs. We nevertheless find this qualifying restriction to be illustrative and implicit in Talisse's thinking. Note that all that is comprised in the term 'rational' in this case is something like being coherent or moderately epistemically responsible; the requirements for rationality are thus minimal. When Talisse claims to have proposed a justification for liberal democracy that can be endorsed by all reasonable citizens, he thus has a basic epistemic sense of reasonableness in mind. What is really meant is that only citizens who are somehow epistemically debilitated or cognitively dysfunctional would not count as rational believers in the sense relevant to (T1).

Now, as EN involves a willingness to enter into a social process of reason-exchange, a commitment to EN carries with it a commitment to facilitate such reason-exchange, or so Talisse asserts. More precisely, Talisse assumes the following:

(T2) Anyone who, upon reflection, sees themselves as operating in compliance with EN is rationally committed to endorse the social institutions facilitating *the epistemically best social process of evidence and reason-exchange*.

The point where this assumption about rational agents gets in contact with liberal democracy is in the following premise:

(T3) There is a set of key liberal democratic institutions that are epistemically best with respect to facilitating the social process of exchange of evidence and reason.

The institutions in question are the 'Institutions associated with the First Amendment [... freedom of speech, freedom of the press, freedom of association, liberty of consciousness ...] and protections for critics, skeptics, dissidents and whistle-blowers' (Talisie 2009, p. 123). We will refer to these institutions as the core liberal institutions, and they will be the primary target of our discussion. Talisie assumes that if the key institutions are to truly foster open-reason-exchange, they must be supported by other democratic institutions securing political equality, equal voting rights, governmental accountability and the like. Hence, what must be endorsed by someone who sees herself as complying with EN is more like the whole package of norms and institutions typically associated with liberal democracy, or liberal democracy in full. Granted this, we thus arrive at the conclusion of the argument:

(T4) Rational believers are rationally committed to endorsing liberal democracy.

Obviously, without (T4), the argument at most shows that we have a rational reason to support the core institutions of liberal democracy directly associated with reason-exchange, not liberal democracy in full. For the purpose of the ensuing discussion, however, we grant (T4), as well as the other premises of the argument, so we do not need to distinguish between an argument supporting the core institutions and an argument supporting liberal democracy in full.

We will refer to (T1)-(T4) as *the master argument*. Crucially, for most of the following discussion, we will not question that the master argument is in fact sound: for all we say, the premises are true, and the conclusion indeed follows from the premises, or can be made to do so by adding uncontroversial extra premises. So, our criticism of Talisie does not depend on denying any of the premises in the master argument, or the validity of the argument.

Yet, despite being sound, we will argue that the master argument fails as a successful public justification of the core institutions of liberal democracy. How can this be? The crucial point to observe is that for the master argument to provide a successful *public* justification of liberal democracy in a given polity, soundness is not enough. The

following two additional assumptions about the members of the polity in question need to be true as well:

(A1) All (or almost all) members of a given polity come out as rational believers in the sense relevant for (T1), irrespective of their moral and religious outlook, or other parts of their reasonable comprehensive views.

(A2) No-one (or almost no-one) among the members of the polity can *reasonably reject* the premises or the inferences of the master-argument, no matter what their religious and moral outlook or other parts of their (reasonable) comprehensive view is.

Note why these two additional assumptions are necessary for the master argument to constitute a successful public justification: If (A1) were false, it could be the case that the master argument were sound (as we have indeed granted that it is), and yet some agents would not be rationally committed to endorse liberal democracy simply because they were not rational believers in the sense required in (T1). In a sense, the argument would not apply to them. Something similar holds if (A2) were false, while (A1) true. In that case, all or almost all agents would be rational believers in the sense relevant for (T1), and yet they could reasonably reject one or more premises of the master argument, in which case they would not be rationally committed to endorse liberal democracy. In that case, the conclusion of the argument would not be binding for them, since they could reasonably reject it.

Our main claim is going to be that (A2) is false and this is why the master argument, despite being sound, fails to constitute a successful public justification of liberal democracy.⁹⁰ But before turning to our reasons why this is so, let us first assess (A1). Is

⁹⁰ In his illuminating discussion of pragmatist justifications for political liberalism, Festenstein notes the following worry about Talisse's argument: 'there is immense scope for reasonable disagreement about what counts as epistemic vice and about what measures should be taken to curtail it.' (Festenstein 2010, p. 37). So, reasonable individuals may disagree about which institutions or practices, democratic or not, best further epistemic aims. This is similar to the objection we present, though the context in which it appears in Festenstein's paper appears to be different. Moreover, Festenstein does not really explain why, when everyone is assumed to be reasonable, there can be such reasonable disagreement nonetheless.

it really true that everyone, or almost everyone, is a rational believer in the sense required for (T1)? Do we all fall under the scope of (T1)?

In Talisse's view this is so, because it is simply near impossible *not* to aim at believing truly. We can take ourselves to hold a range false of beliefs, but it is absurd for us to hold that any particular belief that we have is false. 'We take each individual belief we have, considered one by one, to be true' (Talisse 2009, p. 91). Moreover, it is also near impossible for us to believe that we aim to believe truly and at the same time hold that we are not responsive to evidence and reasons, just as we cannot believe that we do not have any reasons for believing the way we do. 'To say that a proposition is true is to say that it will square ultimately with the best reasons, evidence and argument. When one believes that *p*, one typically takes oneself to have sufficient reasons or evidence for taking *p* to be true.' (Talisse 2009, p. 92)

Consider a case that might pose a problem for (T1). Suppose there is a religious believer who holds firm beliefs about the existence of God, and whose beliefs are 'properly basic'⁹¹ in the sense that they are not based on other beliefs providing them with evidential support. Since it is not obvious that these beliefs are responsive to reason and evidence, it is questionable whether this person qualifies as reason-responsive in the sense relevant for (T1), as far as the aforementioned religious beliefs are concerned. Either these are not genuine beliefs, or the person holding them is not minimally rational with respect to these beliefs.

In response to a challenge of this sort, Talisse points out what is no doubt true: namely, that any such individual inevitably will have a host of other beliefs that *are* responsive to reasons in the right way. If there are non-responsive religious beliefs, they will only comprise a tiny fraction of anyone's total belief system. The claim that Talisse makes is merely that "*for the most part* when we believe, we take ourselves to be responding to reasons." (Talisse 2009, p. 101). A religious believer of the kind we imagine will therefore still, in virtue of all these other reason-responsive beliefs, be within the scope

⁹¹ We borrow this term from Alvin Plantinga (1981)

of (T1). Consequently, it still holds that (T1) applies to most subjects as far as the vast majority of their beliefs is concerned. So, Talisse might argue that (A1) is close enough to being true for the master-argument to succeed as a public justification.

When assessing such a response, it is important to observe the way in which certain religious beliefs, while few in number, might still have a great impact on what an individual believes about many other questions; say questions about abortion or gay rights. Moral or even factual non-religious beliefs may be reason-responsive, and yet crucially depend on certain religious core beliefs that are non-responsive. In consequence, a subject's views about these other matters may to a lesser extent be *all in all* reason-responsive; after all, to a considerable extent, these other beliefs depend on core beliefs that we assume to be non-responsive.

Obviously, it is difficult to decide where this leaves agents with local non-responsive beliefs with respect to their all things considered reason-responsiveness. But we will leave discussion of this issue for another occasion, and simply grant (A1), the assumption that all ordinary believers are reason-responsive in the sense relevant for (T1).

Turn now to (A2). As we pointed out, if (A2) were false (and A1 true), the master argument could be sound, and yet fail as a public justification. All agents would then be rational in the sense relevant for (T1), and yet some agents could nonetheless *reasonably reject* that liberal democracy should be endorsed for the type of reasons that Talisse outlines. As we will explain in a moment, these agents could reasonably reject (T3) of the master argument (maybe some agents could also reject (T2) or (T4), but we don't see any reason to assume that this is so, and we will therefore discuss only the case of (T3)).

A word about how Talisse uses the idea of reasonable rejectability. For Talisse, the idea of reasonable rejectability 'invokes the epistemic norms of reason-responsiveness' (Talisse 2007, p. 86). So, reasonably rejecting an argument means rejecting the premises or validity of the argument *for reasons*. We take this to mean that to reasonably reject

the premises or validity of an argument, one has to first engage with the particular claim and then, from a first-personal point of view, one has to consider oneself to have good reasons for rejecting it. Hence, for a rational believer to be in a position to reasonably reject (T3), is for this believer to reject (T3) for a reason that, from this agent's own point of view, is a good reason.

3. The basic objection

In the following, we want to suggest that some agents may reasonably reject (T3) and consequently that (A2) is false. We argue that a believer can be minimally rational in the sense of operating in accordance with EN, and could indeed explicitly see herself as operating in compliance with EN: Yet, such a believer could reasonably reject (T3), the assumption that the core institutions of liberal democracy facilitates the epistemically optimal exchange of evidence and reason; indeed such a believer may rationally hold that core liberal institutions put her in an epistemically worse off position. Again, this is not because (T3) is in fact false, but because some agents may, given their other factual beliefs about the world, reasonably think that it is. To see how this may happen, consider Steve:

Steve is a man of faith, a devout believer. Steve is a sincere and intelligent man, he is concerned with getting things right and he is reason-responsive in the sense that he is sensitive to new relevant reasons and evidence that may impact his beliefs and he is always willing to elaborate his standpoint with reasons. Steve holds beliefs about God and God's relation to the world, and these beliefs are central to his entire belief system and formative of his moral outlook. In Steve's view, these beliefs are supported by ample evidence and reasons that he is willing to share. But Steve also holds a particular view about which sources of evidence support his beliefs about God. According to Steve's particular set of epistemic norms, what a holy book says in a certain interpretation is a highly reliable source of evidence for truths in a number of domains. Steve is part of a substantial network of fellow citizens and (what for him are)

epistemic authorities who are committed to epistemic norms that are roughly similar to his own. He is thus able to engage in reason-exchange with individuals who share these norms. In society at large, however, individuals who are committed to these norms are in the minority.

Borrowing a term from Alvin Goldman, we will call the various ‘sets of norms, standards, or principles for forming beliefs and other doxastic states’ (Goldman 2010, p. 187) that epistemic agents adhere to for epistemic systems (or E-systems). Among other things, our respective E-systems typically harbor norms for gathering and evaluating evidence. Now, given Steve’s particular E-system, there are important domains of belief in which Steve might not find the sort of exchange of evidence and reason promoted by liberal democracy epistemically helpful. Why? Because Steve will not have reason to think that exchange of reasons and evidence with individuals not sharing his views on proper sources of beliefs is epistemically valuable. That does not mean that Steve would need to think that people who do not share his epistemic commitments are stupid, irrational or unreasonable. Indeed Steve may be willing to engage respectfully in debate with these people, but in so far as the disagreement about proper E-systems that divide them are deep, he may have no reason to hope that such exchange will lead to any kind of epistemic progress. From Steve’s perspective, it may even be worse than that. It may even be, that Steve can rationally believe that a constant flow of unreliable information and open discussion with inherently misguided subjects will have a distorting effect on his belief system.

A devout believer such as Steve may thus come out as a rational believer in the sense relevant to (T1), and Steve may also for that reason be committed to facilitate what he takes to be the best social processes of reason-exchange. But he may, nonetheless, not be rationally committed to (T3), the idea that key liberal institutions are the kind of institution that facilitates the epistemically best exchange of evidence and reason.

Whether Steve should accept (T3) may, among other things, depend on his beliefs about the composition of views among his fellow citizens. If Steve believes that enough participants in the exchange of evidence and reason do not share his E-system, then

Steve will not, *from a first-personal perspective*, have reason to expect that his own epistemic position will improve by being exposed to these other perspectives. In other words, if the dominant set of E-systems in the society in which Steve lives is significantly at odds with central elements of Steve's own E-system, then Steve may have no reason to seek exposure, or may even rationally seek to avoid exposure. Consequently, Steve may, from his point of view, have good reasons not to endorse the institutions that facilitate this exposure.

Imagine, for example, a situation in which news channels, the political debate, influential political organizations etc. almost solely provide information about a Godless world and routinely neglect or reject that evidence relevant to moral and factual questions can come from religious sources. Steve may rationally reject that such an environment will enlighten religiously grounded beliefs. Furthermore, he can rationally fear that his beliefs become more vulnerable to distortion. He may become confused about matters that seemed clear to him before and come to doubt things that he thinks he should not, according to the norms and principles of his own E-system, doubt. From Steve's perspective it thus becomes rational to avoid exposure to reasons stemming from E-systems that are significantly at odds with his own. After all, in Steve's view, individuals who offer such reasons must have violated important norms of evidence. One may ask here how Steve could be sure that his E-system is superior and the answer is, of course, that he can't. But our concern here is the first-personal perspective and it is important to note that this perspective is not a kind of Archimedean point. It is a perspective that is already furnished with beliefs and norms of inquiry. Steve evaluates potential interlocutors according to the basic norms of his particular belief-system, he may be wrong, but this is all he has to go on.

Here is another way of stating the crucial point. The crux of the matter is what commitments follow merely from being reason-responsive. This much seems clear: being reason-responsive requires being responsive to any relevant evidence and reasons brought forth by inquirers that one deems to be at least minimally competent. It seems clear that this is the kind of reason-responsiveness that Talisse has in mind. We see this, for instance, in the examples he uses to illustrate the absurdity of non-responsiveness

from a first-personal perspective. To emphasize the unreasonable epistemic attitude that accompanies non-responsive beliefs, Talisse asks us to consider the following cases:

- (a) I believe that p, but I am unaware of what competent opponents say about p.
- (b) I believe that p, but whenever I state my reasons for p, otherwise intelligent, sincere, and competent people are unmoved.
- (c) I believe that p, but I always lose fairly-conducted argumentative exchanges with competent interlocutors who reject p. (Talisse 2010, p. 48)

It does indeed seem obvious that it is unreasonable to deny subjecting beliefs to examination or opposition from competent interlocutors i.e. inquirers that we deem able to recognize proper sources of evidence and use suitable methods to evaluate and weigh evidence in any given circumstance. But it is not obvious that, from the first personal perspective, it is unreasonable to deny subjecting beliefs to opposition from *incompetent* interlocutors. We can be reasonable in denying the need to revise or reconsider our existing beliefs when encountering what we deem to be clearly irrelevant evidence brought forth by what we deem to be incompetent interlocutors. We should keep in mind that we are finite epistemic agents with natural limits to our time. Being able to pick the right battles or to determine which challenges to any given viewpoint are serious, and which are not, is part of what it means to be an epistemically responsible inquirer. Of course, we should acknowledge that we can be wrong about who the competent interlocutors are and what the relevant evidence is. We can be wrong in several ways: it is possible that we are wrong *objectively*, while *subjectively*, from the first-personal perspective, we can have robust evidence and good reason to believe that reason-exchange in certain circumstances is epistemically non-beneficial or damaging. It is also possible that we are wrong according to our own belief-system, we may have made mistakes according to our own norms of inquiry and evidence. We can acknowledge this risk and still be reasonable in rejecting the epistemic benefits of reason-exchange with certain interlocutors. In this sense it is a kind of cost-benefit analysis: we can be reasonable in holding that the epistemic costs involved in engaging in reason-exchange outweigh the benefits.

This would apply to the perspective of Steve surrounded by atheists as well as atheists surrounded by Steves. Granting that the domains in which these believers disagree constitute an important part of their entire belief-system (as in the case with Steve) and granted that truths that are important to these believers are dependent on these controversial beliefs, these believers have, *from their own point of view*, no reason to support the kind of reason-exchange that will be facilitated by key liberal institutions on epistemic grounds. Of course, we could easily add to Steve's attributes that he, *for moral reasons*, is a warm supporter of liberal democracy but that is another matter, which does not directly concern the question of whether or not we should accept the master argument.

The problem for Talisse's argument arises when there is a significant clash of E-systems in a given society. In pluralist democracies citizens may be divided not only by deep moral disagreements, but also by what we have called deep epistemic disagreements. When discussing abortion, gay rights, science education, euthanasia and stem cell research, we are not merely engaged in moral disagreements, but sometimes also in deep epistemic disagreements. These disagreements may, for example, pertain to how and where to gather evidence about the origins and evolution of life on earth. Many controversies about abortion, stem-cell research and euthanasia turn on an underlying *factual* disagreement about the existence of God. The belief in God's existence or non-existence can significantly shape the way we understand and discuss these important political issues. Think, for example, of how influential this factual belief is in shaping the way believers and non-believers discuss the question of when life begins. Of course, it is not only politically controversial issues that may feature deep epistemic disagreements. Less political disagreements may, for example, pertain to such matters as the existence of an afterlife or divine intervention: factual viewpoints that may not necessarily be immediately relevant to public policy, but that nevertheless are tremendously important to our understanding of the world we live in and thus also important to our general aim of believing truly.

4. Formal epistemic norms and substantive epistemic norms

We think there are some lessons to be learned from a general version of the objection. The objection trades on a distinction between what we might call formal epistemic norms and substantive epistemic norms.⁹² The set of norms we labelled EN, comprising the idea that one should aim at believing truly and that one should respond to reasons and evidence, are formal epistemic norms. These norms are formal in the sense that they do not specify what good or relevant evidence is, or what a proper response to a piece of evidence would be.

Substantive epistemic norms, by contrast, are norms that identify specific types of evidence as good, proper, or relevant in any given area of inquiry. Substantive epistemic norms also specify methods or practices for acquiring such evidence, or for identifying sources of evidence, and norms for proper accommodation of evidence and reason in one's belief system. Here are two crude examples of substantive epistemic norms:⁹³

(SEN 1) Empirical methods such as those used in evolutionary biology are generally reliable regarding the question of the origin of life.

(SEN 2) What the Bible says about the origin of life is weighty evidence regarding the question of the origin of life, and may outweigh other sources of evidence.

Clearly, our full set of epistemological commitments cannot consist merely of formal epistemic norms. They must also contain many substantive epistemic norms. The important point now is that while we may all be committed to the same basic set of formal epistemic norms, say in virtue of being rational believers, this does not entail that we are all committed to the same set of substantive epistemic norms. So, given that EN

⁹² Michael Lynch (2010;2013) discusses a related distinction between basic and non-basic epistemic methods, or fundamental and derivative epistemic principles. A method is basic when it cannot be 'justified solely by appeal to any other method', otherwise it is non-basic, and 'a principle is fundamental when it is about such a [basic] method and derivative when it is not' (Lynch 2010, p. 264). The two sets of distinctions are cross-cutting. Formal epistemic norms can be either basic or non-basic and the same goes for substantive epistemic norms. For further discussion on the distinction between fundamental and derivative epistemic principles see also Boghossian (2006).

⁹³ See similar cases in see for example: Lynch (2010;2012), Kitcher (2008) and Nagel (2008)

is a set of formal epistemic norms, two individuals might both accept (and operate in accordance with) EN, and yet accept very different substantive epistemic norms, like those we mentioned above. And, importantly, they may do so without being irrational in the sense that they violate formal epistemic norms. In other words, formal epistemic norms, such as the norms of reason-responsiveness, underdetermine which substantial epistemic norms one is rationally committed to.

For rational individuals, the acceptance of substantive epistemic norms will critically depend on their factual beliefs, and may also depend on religious and moral beliefs. We should, therefore, in some cases expect individuals to commit to very different substantive epistemic norms as a result of having very disparate other commitments.

The importance of this is that the acceptance of (T3) - the premise that key liberal institutions indeed facilitate the epistemically best exchange of reason and evidence - depends on certain substantive epistemic norms *and* importantly on the composition of substantive epistemic norms held by individuals in a given society. Holders of certain substantive epistemic norms that are in the minority in a society can come to reasonably reject (T3). This is so even if we grant that (T3) is in fact true. The wider implication is that the truth of (A2) now is hostage to fortune.

If we now draw upon our example from the previous section, consider again religious beliefs and beliefs about the world that are based on religious beliefs (call these direct and indirect religious R-beliefs). Suppose that these beliefs support a certain set of substantive epistemic norms (call them R-norms) such that the following holds:

(S1) A substantial number of people have R-beliefs about the world.

(S2) Subjects who hold R-beliefs and rationally accept R-norms can be reasonable, i.e. abide by the norms of reason-responsiveness.

(S3) Subjects who accept R-beliefs and R-norms can reject (T3) above without being unreasonable.

In the scenario depicted by (S1)-(S3) there is a substantial number of people for whom there is no epistemic justification of liberal democracy of the kind Talisse has outlined. In this scenario, (A2) fails. Though the premises in the master argument may indeed be true, the epistemic justification of liberal democracy would still not succeed as a public justification.

Our examples have drawn upon religious believers and the way they can come to reject (T3). It is, nonetheless, crucial to observe that the example could be turned around such that non-religious believers may find vital parts of their E-systems to be in the minority in a society (a society dominated by R-beliefs and R-norms). In this case, non-religious believers could reasonably reject (T3). The decisive point is that believers and non-believers can be reasonable and subscribe to E-systems that clash at the level of substantive epistemic norms in such a way that the party in the minority can come to reasonably reject (T3).

5. How might one respond to our objection, on behalf of the socio-epistemic justification of liberal democracy?

One option would be to deny (S1), which amounts to holding that there are no or only a few individuals around who hold R-beliefs and R-norms. If this were the case, the clash between R-norms and R-beliefs and the substantive epistemic norms of other E-systems would not pose a serious problem for the socio-epistemic justification, which takes as its starting point the ordinary believer. We have, however, modeled Steve to be an ordinary believer, and we suggest that as a matter of empirical fact that in our actual democracies you may find many religious believers who resemble Steve in the relevant respects. What we assume is merely that in our actual democracies there is a significant number of religious people for whom religious beliefs are central to their belief-system and formative of their moral outlook, and depending on the epistemic make-up of their fellow citizens, this may permit them to reasonably reject (T3).⁹⁴

Alternatively, one might reject that our ordinary believer is reasonable, i.e. reject (S2). There are several ways of pressing this option. Targeting our particular example, one may deny the claim that holders of R-beliefs and R-norms are reasonable. One way to argue this would be to show that a commitment to merely formal epistemic norms inevitably *excludes* commitment to R-beliefs and R-norms. Such a view would entail that those who hold such beliefs and norms (R-beliefs and R-norms) must have made a mistake in rationality somewhere, making them unreasonable. Alternatively, one might want to define reasonableness partly in terms of some specific set of substantive epistemic norms that excludes commitment to R-norms.

For the reasons already mentioned, we do not find either of these options promising; it simply does not seem that a commitment to formal epistemic norms entails commitment to any particular belief about the world, or any particular set of substantive epistemic norms. And holding R-beliefs and committing to R-norms does not appear unreasonable per se, so excluding these from the realm of the reasonable by mere stipulation does not seem warranted.

In his recent book, Philip Kitcher contests this latter point. Kitcher argues that holders of what we have called R-norms and R-beliefs tend to be committed to what Kitcher labels *chimeric epistemologies*: religious believers will accept the reliability of certain established scientific methods in some domains, but they deny the reliability of the very same methods in other apparently similar domains in favour of entirely different and potentially conflicting methods. These believers thus endorse 'methods of certifying that can deliver opposing verdicts about acceptance and rejection' (Kitcher 2011, p. 187). Due to the apparent arbitrary way that these believers apply epistemic norms and reject scientific reasons, one might with Kitcher suggest that believers are epistemically irresponsible and not properly reason-responsive. Kitcher, at least, seems to conclude that such beliefs and norms must be contained in private domains and bracketed from public reasoning.

We do not think that this is an argument that can save Talisse's socio-epistemic justification. First, it is far from clear that it is impossible to be rationally committed to chimeric epistemologies. As we said above, rational commitment to substantive epistemic norms depends on which factual beliefs one accepts. So, roughly it only takes a sufficiently chimeric view of the world to be rationally committed to chimeric epistemologies, or more precisely, to applying very different methods of inquiry to apparently similar, but really quite dissimilar, domains of inquiry. Such a chimeric view may, for example, support that some domains in biology can be investigated by scientific methods and evidence whereas in other domains these are outmatched by religious methods or evidence. In other words, a proponent of chimeric epistemologies will surely reject the universal applicability of scientific methods, but need not do so ungrounded in reason. From the first personal-perspective, the perspective that Talisse is concerned with, these believers need not be violating rules of rationality. They are being reason-responsive and are operating in accordance with the epistemic rules and principles of their own particular E-system.

When opting for the strategy of denying (S2), it is also worth observing that, if (S1) is true then one would have to concede that there is a substantial number of unreasonable citizens. In turn this would imply that there is no epistemic justification for liberal democracy for these many citizens. This is unfortunate for the prospects of providing a public justification of liberal democracy that seeks to accommodate a diversity of moral, philosophical and religious worldviews.

There is a third line of response, which amounts to rejecting (S3). It can be argued that in *most* non-moral and non-religious domains, individuals operate within roughly similar E-systems, that in turn commits them to (T3), and accordingly that any R-beliefs and R-norms that our ordinary believer holds will be limited to certain moral and religious domains. Deep disagreements are thus secluded in moral and religious domains whereas in the non-moral domain epistemic agents operate on common ground. Talisse seems to subscribe to a version of this view, and he further argues that we can use this common ground to make progress on our deep moral disagreements. According to Talisse, many deep moral disagreements will harbour non-moral

components, and interlocutors will benefit greatly from reason-exchange on this component of the disagreement. The idea is that reason-exchange on the non-moral components of deep moral disagreements can either eventually solve the disagreement or at least advance the disagreement by enlightening the contending parties with regard to relevant factors unknown to them before (Talisie 2008). This means that even though certain parts of individuals' E-systems in a given society may be irresolvably at odds, these individuals may still have epistemic reasons for retaining a commitment to the key liberal institutions on behalf of their non-moral beliefs *as well as* their moral and religious beliefs. Individuals can enlighten each other with regard to non-moral facts relevant to their deep moral commitments and thus make epistemic progress in both domains.

In response to this, we note again that the wider impact of deep epistemic disagreements seems to be overlooked in this line of reasoning. Many familiar persistent moral disagreements seem to involve disagreement about basic moral and religious questions, which may turn precisely on differences regarding substantive epistemic norms, particularly about norms of proper evidence and reasons relevant to the disagreement. To illustrate this point, return for a moment to the disagreement about evolution in public education or the abortion controversy and ask: What factual (non-moral) components of these disagreements could be resolved with more reason-exchange that would make a significant difference for the controversy? If I believe a holy book and certain religious authorities are vital sources in determining the origins and evolution of life on earth and you believe that neither the book nor these authorities can contribute in any way to settling this matter, then we will be so epistemically divergent that it may be hard to think of a reason that the other part could produce which could make either of us change our mind. If my starting point in the abortion debate is that God says that life is sacred and starts at conception, and you barely agree to even consider this (in my view weighty) evidence, then from my perspective you are hardly a competent and worthy interlocutor on this issue. This assessment on my part may be entirely reasonable. That is despite the fact that we may be able to make some progress on certain non-moral, empirical facts bearing on the issue (such as the relation between illegalization of abortion and the incidence of unsafe abortions).

Concluding remarks

It is important to stress that there *is* a socio-epistemic justification of key liberal institutions - it is just that it depends on ordinary believers' agreeing on factual assumptions about what the world is like and how evidence is best gathered and assessed (that is, substantive epistemic norms), and on contingent facts about the composition of epistemic commitments among ordinary individuals in a given society. Talisse has pointed to a set of shared formal epistemic norms (EN). However, this set of norms turns out to be too thin to establish a commitment to reason-exchange in a liberal democratic setting. We have illustrated that in democratic societies, the existence of deep, sometimes irreconcilable, disagreements on substantive epistemic norms may cause individuals to reasonably reject that they are epistemically committed to reason-exchange with fellow citizens. The socio-epistemic justification is thus open to reasonable rejection. This is why Talisse's socio-epistemic justification fails as a *public justification*.

We conclude that Robert Talisse has presented us with a fascinating and persuasive justification of core liberal institutions. Unfortunately, it is not a public justification that meets the persistent challenges that accompany a recognition of the fact of reasonable pluralism.

References

- Audi, Robert. 2000. *Religious Commitment and Secular Reason*. Cambridge University Press, New York
- Baurmann, Michael. 2007. Rational Fundamentalism? An Explanatory Model of Fundamental Beliefs. *Episteme* 4, pp. 150-166.
- Boghossian, Paul. 2006. *Fear of Knowledge: Against Relativism and Constructivism*, Oxford: Oxford University Press

- Buchanan, Allen. 2004. Political Liberalism and Social Epistemology. *Philosophy and Public Affairs* 32, pp. 95-130.
- Goldman, Alvin I. 2010. 'Epistemic Relativism and Reasonable Disagreement'. In *Disagreement*, Richard Feldman and Ted A. Warfield (Eds.). Oxford: Oxford University Press
- Festenstein, Mathew. 2010. Pragmatism, Inquiry, and Political Liberalism. *Contemporary Political Theory* 9, pp. 25-44
- Kitcher, Philip. 2011. *Science in a Democratic Society*. Amherst, NY: Prometheus Books
- 2008. Science, Religion, Democracy in *Episteme: A Journal of Social Epistemology*, Volume 5, Issue1, pp. 5-18
- Lynch, Michael P. 2013. Epistemic commitments, epistemic agency and practical reasons, *Philosophical Issues* 23 (1), pp. 343-362
- 2012. 'Democracy as a Space of Reasons' in *Truth and Democracy*, Jeremy Elkins and Andrew Norris (Eds.), University of Pennsylvania Press, Philadelphia, Pennsylvania
- 2010. 'Epistemic Circularity and Epistemic Incommensurability'. In *Social Epistemology*, Adrian Haddock; Alan Millar, Duncan Pritchard (Eds.), Oxford: Oxford University Press
- Mill, John Stuart. 1870. *On Liberty*. People's ed., Longmans, Green, London: Reader and Dyer
- Nagel, Thomas. 2008. Public Education and Intelligent Design' *Philosophy & Public Affairs*, Vol. 36, issue 2, pp. 187-285
- Plantinga, Alvin. 1981. Is Belief in God Properly Basic? *Noûs* 15, pp. 41-51.
- Rawls, John. 2005. *Political Liberalism*. Expanded ed., New York: Columbia University Press
- Rawls, John, and Samuel Richard Freeman. 1999. *Collected Papers*. Cambridge: Harvard University Press

- Talisse, Robert B. 2009. *Democracy and Moral Conflict*. Cambridge: Cambridge University Press
- 2007. *A Pragmatist Philosophy of Democracy*, Routledge Studies in Contemporary Philosophy, New York: Routledge
- 2010. Reply to Festenstein. *Contemporary Political Theory* 9, pp. 45-49.
- 2008. Towards a Social Epistemic Comprehensive Liberalism. *Episteme: A Journal of Social Epistemology* 5, pp. 106-128.
- Talisse, Robert B., Aikin, Scott F. 2011. *Reasonable Atheism*. Amherst NY: Prometheus Book

Bibliography

- Anderson, Elizabeth. 2011. Democracy, Public Policy, and Lay Assessments of Scientific Testimony. *Episteme*: Vol.8, issue 2, pp. 144-164
- Audi, Robert. 2000. *Religious Commitment and Secular Reason*. Cambridge; New York: Cambridge University Press.
- Audi, Robert and Wolterstorff, Nicholas. 1997. *Religion in the Public Square*. Lanham, Md: Rowman & Littlefield
- Baurmann, Michael. 2007. Rational Fundamentalism? An Explanatory Model of Fundamentalist Beliefs. *Episteme* 4, pp. 150-166.
- Boghossian, Paul. 2006. *Fear of Knowledge: Against Relativism and Constructivism*, Oxford: Oxford University Press.
- Buchanan, Allen. 2004. Political Liberalism and Social Epistemology. *Philosophy and Public Affairs* 32, pp. 95-130.
- Christensen, David. 2007. Epistemology of Disagreement: The Good News, *Philosophical Review*: 116(2), pp. 118-217
- Cornelissen, Gemma. 2012. 'Belief-based Exemptions: Are Religious Beliefs Special? *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law*.
- Daniels, Norman. 1979. 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', *Journal of Philosophy*, 76(5): 256–82
- Douglas, Heather. 2015. Politics and Science: Untangling Values, Ideologies, and Reasons, *The ANNALS of the American Academy of Political and Social Science*, 658: 296-306
- Eberle, Christopher J.. 2002. *Religious Convictions in Liberal Politics*. New York: Cambridge University Press
- Eisgruber, Christopher L. & Sager, Lawrence. 2007. *Religious Freedom and the Constitution*. Harvard University Press
- Feldman, Richard. 2006. 'Epistemological puzzles about disagreement'. In *Epistemology Futures*. (Ed. S. Hetherington), Oxford: Clarendon Press, pp 216-236
- Festenstein, Mathew. 2010. Pragmatism, Inquiry, and Political Liberalism. *Contemporary Political Theory* 9, 25-44
- Gaus, Gerald. 2003. *Contemporary Theories on Liberalism*. London: Sage

- Galston, William. 1995. Two Concepts of Liberalism. *Ethics*: Vol. 105, No. 3, pp. 516-34
- Garnett, Richard W. 2009. A Hands-off Approach to Religious Doctrine: What are We Talking About, 84 *Notre Dame L. Rev.* 837
- Goldman, Alvin. 2010. Epistemic Relativism and Reasonable Disagreement. In *Disagreement*, Eds. Richard Feldman and Ted A. Warfield. Oxford University Press, New York
- Goldstein, Jared A. 2005. Is There a “Religious Question” Doctrine? Judicial Authority to Examine Religious Practices and Beliefs, 54 *CATH. U. L. REV.* 497
- Greenawalt, Kent, 1987. *Conflicts of Law and Morality*, Oxford: Clarendon Press.
- Greenawalt, Kent. 1994. On Public Reason. *Chicago-Kent Law Review*: Vol. 69: Issue 3, Article 5, pp.669-689
- Greenawalt, Kent. 1995. *Private Consciences and Public Reasons*. New York: Oxford University Press
- Greenawalt, Kent. 1995. Some Problems with Public Reason in John Rawls's Political Liberalism, 28 *Loy. L.A. L. Rev.* 1303
- Greenawalt, Kent. 1998. Hands Off! Civil Court Involvement in Conflicts over Religious Property, 98 *COLUM. L. REV.* 1843, 1844
- Greenawalt, Kent. 2008. *Religion and the Constitution: Volume 2: Establishment and Fairness*, Princeton: Princeton University Press
- Greene, Abner S. 2004. Constitutional Reductionism: Rawls and the Religion Clauses. *Fordham Law Review*, Vol 72 Issue 5
- Habermas, Jürgen. 2008. *Between Naturalism and Religion: Philosophical Essays*, Ciaran Cronin (trans.), Cambridge: Polity Press
- Habermas, Jürgen. 2006. Religion in the Public Sphere, *European Journal of Philosophy*, Vol 14no.1, pp.1-25
- Habermas, Jürgen. 1995 ‘Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism’, *The Journal of Philosophy*, 92 (3): 109–131.
- Jønch-Clausen, Karin & Kappel, Klemens. 2015. *Ethical Theory and Moral Practice*, Volume 18, Issue 2, pp. 371-384
- Kappel, Klemens. 2012. ‘The problem of deep disagreement’. *Discipline Filosofiche*, Vol. XXII, No. 2, 2012, pp. 7-25.

Kappel, Klemens; Nielsen, Morten Ebbe Juul; Andersen, Martin Marchman; Jønch-Clausen, Karin. 2014. 'La neutralità liberale e il disaccordo fattuale', *Iride*, Vol. 27, No. 3, pp. 577-594.

Kelly, Thomas. 2005. The Epistemic Significance of Disagreement. In *Oxford Studies in Epistemology*, vol. 1. Eds. T. Gendler and J. Hawthorne. Oxford: Oxford University Press

Klayman, Joshua. 1995. 'Varieties of Confirmation Bias' in Busemeyer, R. Hastie, & D. L. Medin (Eds.) *Decision-making from a Cognitive Perspective*. New York: Academic Press

Kitcher, Philip. 2011. *Science in a Democratic Society*. Amherst, N.Y.: Prometheus Books.

Koppelman, Andrew. 2013. *Defending American Religious Neutrality*. Cambridge: Harvard University Press

Koppelman, Andrew. 2009. The Troublesome Religious Roots of Religious Neutrality, 84 *Notre Dame L. Rev.* 865

Laborde, Cecile. 2013. Justificatory Secularism in Gavin D'Costa, Malcolm Evans, Tariq Modood, Julian Rivers (eds.) *Religion in a Liberal State: Cross-Disciplinary Reflections*. New York: Cambridge University Press

Lafont, Cristina. 2007. Religion in the Public Sphere: Remarks on Habermas's Conception of Public Deliberation in Postsecular Societies, *Constellations* Volume 14, No 2 pp.239-259

Lafont, Cristina. 2009. Religion and the public sphere: What are the deliberative obligations of democratic citizenship? *Philosophy and Social Criticism*. 35 (1-2), pp127-150

Larmore, Charles. 1996. *The Morals of Modernity*. New York: Cambridge University press

Larmore, Charles. 1999. 'The Moral Basis of Political Liberalism', *The Journal of Philosophy*, 96(12): 599–625

Laycock, Douglas. 2011. *Religious Liberty: The free exercise Clause*. Cambridge: Eerdman Publishing

Levine, Samuel J. 2009. 'The Supreme Court's Hands-Off Approach to Religious Doctrine: An Introduction', *Notre Dame Law Review*, Vol. 84, No. 2

- Lupu, Ira C. & Tuttle, Robert W. 2014. *Secular Government, Religious People*. Cambridge: Eerdman publishing
- Lynch, Michael P. 2013. Epistemic commitments, epistemic agency and practical reasons, *Philosophical Issues* 23 (1):343-362
- Lynch, Michael P. 2010. Epistemic Circularity and Epistemic Incommensurability. In *Social Epistemology*, edited by Adrian Haddock; Alan Millar, Duncan Pritchard. Oxford: Oxford University Press
- McConnell, Michael. 2000-2001. 'The problem with singling out religion'. *50 DePaul L. Rev.* 1
- Mill, John Stuart. 1870. *On Liberty*. People's ed. ed. London: Longmans, Green, Reader and Dyer
- Perry, Michael 1988. *Morality, Politics and Law*, New York: Oxford University Press
- Perry, Michael. 2003. *Under God?*, Cambridge: Cambridge University Press
- Nagel, Thomas. 2008. Public Education and Intelligent Design' *Philosophy & Public Affairs*, Vol. 36, issue 2, pp. 187-285
- Plantinga, Alvin. 1981. Is Belief in God Properly Basic? *Noûs* 15, pp.41-51.
- Perry, Michael 1988. *Morality, Politics and Law*, New York: Oxford University Press
- Quong, Jonathan. 2011. *Liberalism without Perfection*. Oxford: Oxford University Press
- Rawls, John. 1997. The Idea of Public Reason Revisited". *The University of Chicago Law Review* 64: 765–807.
- Rawls, John.1999. *A Theory of Justice*. MA: Havard University Press
- Rawls, John. 2005. *Political Liberalism*. Expanded ed. New York: Columbia University Press.
- Rawls, John, and Samuel Richard Freeman. 1999. *Collected Papers*. Cambridge, Mass.: Harvard University Press.
- Regnerus, Mark. 2012. How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study. *Social Science Research* 41, pp752-770
- Reidy, D., 2000, "Rawls's Wide View of Public Reason: Not Wide Enough," *Res Publica*, 6(1): 49–72

- Rorty, Richard. 1994. 'Religion as a conversation stopper', *Common Knowledge* 3 (1):1-6
- Schwartzman, Micah. 2011. The Sincerity of Public Reason. *Journal of Political Philosophy*, Vol 19, Issue 4
- Stout, Jeffrey. 2005. *Democracy and Tradition*. Princeton, NJ, USA: Princeton University Press
- Talisie, Robert B. 2009. *Democracy and Moral Conflict*. Cambridge, UK; New York: Cambridge University Press.
- Talisie, Robert B. 2007. *A Pragmatist Philosophy of Democracy*, Routledge Studies in Contemporary Philosophy; New York: Routledge.
- Talisie, Robert B. 2010. Reply to Festenstein. *Contemporary Political Theory* 9, pp. 45-49.
- Talisie, Robert B. 2008. Towards a Social Epistemic Comprehensive Liberalism. *Episteme: A Journal of Social Epistemology* 5, 106-128.
- Talisie, Robert B., Aikin, Scott F. 2011. *Reasonable Atheism*. Amherst, New York: Prometheus Books
- Taber and Lodge. 2006. Motivated Skepticism in the Evaluation of Political Beliefs. *American Journal of Political Science* Volume 50, Issue 3, pp.755–769
- Torcello Lawrence. 2011. The Ethics of Inquiry, Scientific Belief, and Public Discourse. *Public Affairs Quarterly*, Vol. 25, No. 3 pp. 197-215
- Volokh, Eugene. 1999. Common-Law Model for Religious Exemptions, 46 *UCLA L. Rev.* 1465.
- Weinstock, Daniel. 2002. 'Citizenship and Pluralism' in Simon Robert L. (ed.) *The Blackwell Guide to Social and Political Philosophy*. Padstow: Blackwell Publishers, pp.239-267
- Weithman, Paul. 1991. The separation of church and state: some questions for Professor Audi," *Philosophy & Public Affairs*, 20, pp 52–65
- Weithman, Paul. 2002. *Religion and the Obligations of Citizenship*, Cambridge: Cambridge University Press.

English Summary

In the dissertation, I examine the role of science and religion in public reason. In particular, I examine the widely accepted ideals that religious reasons should be restricted and scientific reasoning privileged in public reason. My main focus is Rawls's public reason account, which has been and still is tremendously influential in contemporary theorizing on legitimacy and public justification. The dissertation consists of four articles and an introduction that shows how these articles relate to my main topic of concern.

In the dissertation's first article, we argue that Rawls's wide view of public reason still has not overcome a sincerity challenge. We follow Micah Schwartzman in arguing that insincere political deliberation may lead to 1) lack of due respect 2) side-tracking of important policy issues 3) irrational consequences and 4) polarization. We argue that public reason's sincerity principle, as articulated by Schwartzman, is either too strong to be met by normally functioning epistemic agents or too weak to address the abovementioned concerns.

In the second article, we examine a science stricture in Rawls's public reason account, the stricture that public reasons must be informed by and accord with non-controversial scientific findings and methods. We provide the most plausible interpretation of the stricture and explore various ways by which Rawls may justify such a science stricture. We ultimately conclude that all the justification routes that can be drawn from Rawls's theoretical framework are unsuccessful.

The dissertation's third article examines the role of science and religion in religious exemption cases. In exemption cases a 'hands-off' practice is usually applied to the religious objectors' claim, which means that the objectors claim will not be subject to merit judgment by the courts. I argue for a limitation to this hands-off approach, I defend a religious evidence rule which says that factual/empirical beliefs/reasons are subject to hands-off practice only insofar as these factual beliefs are based on religious evidence.

In the final article, we examine a recent epistemic justification of liberal democracy proposed by Robert Talisse. Talisse argues that a justification of liberal democracy exists that is grounded in basic epistemic commitments that all cognitively functional citizens can subscribe to. If citizens were to reflect on some of their most basic epistemic commitments, they could come to see that in virtue of these commitments, they are also committed to endorsing key liberal democratic institutions, whatever their comprehensive worldviews may be. We argue that the socio-epistemic justification can be reasonably rejected on its own terms and thus fails as a public justification approach.

Dansk Resumé

I Ph.d.-afhandlingen diskuterer jeg to demokratiske idealer for vores fælles politiske beslutningsproces: 1) Religiøse argumenter skal begrænses, og 2) videnskabelig argumentation skal gives en fortrinstillig. Jeg ser primært på, hvordan disse idealer konstrueres og forsvares i John Rawls' indflydelsesrige teori om 'public reason' (offentlig fornuft). Afhandlingen består af fire artikler samt en introduktion, hvor jeg gør rede for afhandlingens overordnede problemstilling og hvordan artiklerne hver især forholder sig til denne.

Ifølge Rawls' public reason-teori skal samfundets grundlæggende love, politikker og institutioner kunne begrundes uafhængigt af bestemte sekteriske livsanskuelser. I politiske beslutningsprocesser bør borgere derfor kunne stille tilstrækkelige og hermed *oprigtige* sekulære begrundelser til grund for fundamentale anliggender. I afhandlingens første artikel diskuterer vi public reason's oprigtighedsprincip. Vi viser, hvordan uoprigtige politiske begrundelser kan føre til 1) manglende respekt for frie og lige medborgere, 2) forvrængning af vigtige politikker, 3) irrationelle udfald/konsekvenser og 4) polarisering. Vi argumenterer herefter for, at den hidtil mest gennearbejdede artikulering af public reason's oprigtighedsprincip (fremlagt af Micah Schwartzman) ikke formår at imødekomme disse problemer.

I afhandlingens anden artikel ser vi på et videnskabskriterium som Rawls sætter for den rette brug af offentlige begrundelser (public reasons): disse skal ifølge Rawls stemme overens med ukontroversielle videnskabelige metoder og fakta. I artiklen giver vi den mest plausible forståelse af dette kriterium og undersøger derefter, hvorledes kriteriet kan retfærdiggøres inden for Rawls' teoretiske forståelsesramme. Vi kommer frem til en negativ konklusion: Videnskabskriteriet kan ikke understøttes i Rawls' teori.

I den tredje artikel undersøger jeg religiøse og (u)videnskabelige begrundelser i den del af den Amerikanske lovgivning, som handler om religionsbaserede fritagelser (religious exemptions). Jeg argumenterer for at den juridiske praksis, som går på at undlade at vurdere kvaliteten/gyldigheden af sagsøgers begrundelse deres fritagelsesbehov, ikke skal gælde faktuelle begrundelser, som ikke baseres på religiøst evidens.

I afhandlingens sidste artikel ser vi på Robert Talisse's epistemiske begrundelse af det liberale demokratis grundlæggende institutioner, som baseres i basale epistemiske normer, som Talisse mener alle (kognitivt normalt fungerende) mennesker kan tilskrive sig. Vi viser, hvordan dette interessante argument fejler, da det ikke i tilstrækkelig grad tager højde for dybden af epistemiske uenigheder i et pluralistisk liberalt demokrati.